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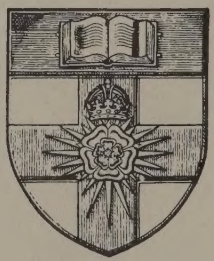

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XIII.

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE.

TORONTO:

THE CARSWELL CO., LIMITED.

SYDNEY, N.S.W.:

LAW BOOK CO. OF AUSTRALASIA, LIMITED.

1919.

This Volume should be cited as 13 Cr. App. R.

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LONDIN.
UNIV.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE ATKIN.

GEORGE LEVERETT.

1917
30 *July.*

Young person—Severity of sentence.

This was an appeal against sentence by leave of Low J. Appellant was convicted on the 7th of July, 1917, at the Middlesex Sessions, of housebreaking, and was sentenced by the Chairman to two years' imprisonment with hard labour.

Appellant in person.

The Crown was not represented.

THE LORD CHIEF JUSTICE: The appellant was convicted of breaking and entering a house and stealing a bag, and also of receiving property the proceeds of another housebreaking. He was sentenced to two years' imprisonment, with a recommendation that he should be dealt with under the modified Borstal system. He applies for a reduction of that sentence. On the facts there is nothing but his youth to be said in his favour. On his arrest he made the statement that he had broken into twenty-five houses in the same road. He has not been convicted before, and is only fifteen and a half years old. The question is what is to be done with him. If he was sixteen the Court would have power to send him to a Borstal Institution, but as he is under sixteen we have not that power. The Chairman sentenced him to two years' imprisonment, seeking to reform as well as punish him. The shorthand note shews that he regretted, as we regret, that there is no power to send him at once to a Borstal Institution.

1917
30 *July.*

GEORGE LEVERETT.

Reading L.C.J.

The Secretary of State has power to transfer him to a Borstal Institution when he arrives at an age at which he can be sent there. If we had the power we should make him serve his sentence until he is sixteen, and then be transferred to a Borstal Institution, and we recommend, so far as it lies with us, that such a transfer be made if it seems fit to the Home Secretary to do so. We do not think fit otherwise to interfere with the sentence, except that the imprisonment should be in the second division

Sentence varied.

A. L. B. T.

EDWARD MORGAN.

When the jury are directed that they may consider together distinct counts for different offences and there has been misdirection on one, the Court will quash a conviction.

This was an appeal against conviction on matters of law. Appellant was convicted on the 29th June, 1917, at the Central Criminal Court, before the Common Serjeant, of obtaining credit under false pretences, and with obtaining money by false pretences; he was sentenced to nine months' imprisonment with hard labour.

Hugo Marshall for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted on three counts of an indictment, the first two of which charged him with obtaining credit by fraud from one Holdaway by means of post-dated cheques drawn by himself, which were dishonoured: the third count charged him with obtaining £2 : 2*s.* 6*d.* from a Mrs. Hall in return for a cheque for £5 : 2*s.* 6*d.* drawn, not by himself, but by the Mahogany Co., Ltd., signed by two directors, one of whom was named Essian. This cheque and another one had been given to the appellant in return for a receipt which bore the following words, "Received two cheques for £4 : 14*s.* 6*d.* and £5 : 2*s* 6*d.*, to be accounted for. I undertake to protect Mr. Essian. E. Morgan." As the appellant had not paid the money to Essian the cheques in question were stopped by him. The false

1917
30 *July*.

EDWARD MORGAN.

Reading
L.C.J.
Coleridge J.
Atkin J.

pretence alleged in the indictment in respect of this cheque was that it was a good and valid security for the payment of £5 : 2*s*. 6*d*. A third person taking such a cheque innocently and for value could sue the signatory upon it, although the cheque had been given on the condition that it was only to be used in certain circumstances. Consequently there was no false pretence made by the appellant.

The three charges were tried together, and the Common Serjeant directing the jury told them that they had to decide what was the appellant's intention, and that, in coming to a conclusion on this point, they were at liberty to take all the charges into consideration in dealing with each one. This was a misdirection. The charges did not relate to similar transactions, and evidence of the Essian cheque was not relevant to the other cases within the decisions in *Makin* v. *Attorney-General for New South Wales*, 1894 A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148; and *Fisher*, 1910 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176.

Percival Clarke for the respondents. The case for the Crown was that the appellant followed a systematic course of presenting to innocent persons cheques, signed either by himself or by third persons, which he knew would not be met, and by these means robbing them of their money. In the case of Essian's cheque the appellant knew he had not protected Essian, and that therefore the cheque would not be met. If the conviction with regard to that cheque cannot stand, the evidence on the two other counts justified the jury in finding a fraudulent intent, and therefore there has been no miscarriage of justice, even assuming that they were wrongly directed to take the Essian case into consideration on that point.

THE LORD CHIEF JUSTICE: The appellant was convicted on two counts of an indictment which charged, under s. 13 of the Debtors Act, obtaining credit by false pretences or fraud, and on a third count which charged him with obtaining money from Mrs. Hall by false pretences, the false pretences alleged being that the cheque which he presented to her was a good and

1917
30 *July*.

EDWARD MORGAN.

Reading L.C.J.

valid order for the payment of £5 : 2*s*. 6*d*. The Common Serjeant, in directing the jury, told them that they could take into account the various cases in deciding each individual case. The main question was whether it was a trick, and he directed the jury's attention to the necessity of finding an intent to defraud. There is no direction to the jury on the transaction with Mrs. Hall to the effect that the cheque was in her hands as a *bonâ fide* holder for value, and therefore may have been a good and valid security.

The facts as regards that case are that the appellant had a cheque in his hands for £5 2*s*. 6*d*., signed by Essian, for which he had given an undertaking in these words: "Received two cheques for £4 : 14*s*. 6*d*. and £5 : 2*s*. 6*d*., to be accounted for. I undertake to protect Mr. Essian. E. Morgan." The evidence shews that it was intended that the appellant should be entitled to deal with the cheque, but it was his business to secure Essian and protect him from having to pay money for the cheque. The appellant gave this cheque to Mrs. Hall in return for money which she handed to him. The charge is that of obtaining money by false pretences; the difficulty is to see what the false pretence is. The cheque in the hands of Mrs. Hall would be a good security against Essian; if there was any fraud it was by the appellant on Essian, and that is not the matter that was then being inquired into by the jury. There was an important omission from the direction of the Common Serjeant, who is usually so careful, which may well have affected the mind of the jury on the question whether the cheque was worthless. Therefore the conviction on that charge cannot stand.

We then have to consider if we are satisfied that on the other two charges the jury would have convicted, apart from the evidence as to Essian's cheque, and if told to disregard that evidence. We do not think that we are in a position to hold that the jury would have convicted, and it is not sufficient that they might have done so. If we are left in doubt, following the law as laid down in this Court since the passing of the Criminal Appeal Act, we must direct the conviction to be quashed. The difficulty with regard to the Holdaway transaction is that the appellant honoured cheques presented after the cheques which formed the subject of the indictment were negotiated. After that date at least four cheques, drawn on the appellant's account.

were honoured by the bank. If the jury had only had to consider the Holdaway cases without reference to the Essian cheque we cannot think it is certain that they would have convicted. For these reasons the conviction must be quashed.

1917
30 *July.*

EDWARD MORGAN.

Reading L.C.J

Conviction quashed.

Solicitors for the Respondents—*Wontner & Sons.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE LOW.

1917
31 *July.*

ERNEST FREDERICK SEILER COLLINS.

If evidence of previous convictions has been admitted owing to defendant's action at the trial, the Court will not grant relief on that ground only.

Appeal against conviction and sentence.

The appellant was convicted on July 5th, 1917, at the County of London Sessions, before the Chairman, of larceny, and was sentenced to fifteen months' imprisonment with hard labour.

Frederick Sharp for the appellant (under s. 10 of the Criminal Appeal Act, 1907). The appellant was convicted on an indictment charging him with stealing a magneto, a stepney wheel, some tyres and other accessories to a taxi-cab. The cab was left by the driver outside a public-house in Walworth. Twenty minutes later the appellant was seen to walk away from the cab, which was then standing in a road two and a half miles away. He was carrying a bundle which, according to a witness, might have contained a magneto. Information was given to the police, and the appellant was arrested. It is contended that there was no evidence to connect the appellant with the stolen property. None was found on him nor at his home, nor was there any sudden accession of prosperity which so often follows in such cases; on the contrary appellant's wife had to sell things to provide food. The appellant instructed me wrongly in regard to his past career. I put his character in issue on instructions from appellant after due warning of what might follow; as a result, a list of convictions was put before the jury who convicted him, it is submitted on that, and not on the evidence before them. I do not argue the sentence.

1917
31 July.

ERNEST FREDERICK SEILER COLLINS.

Reading L.C.J.
Coleridge J.
Low J.

J. B. B. MacMahon for the Crown. There was ample evidence to justify the verdict of the jury. The evidence of previous convictions was admitted entirely through the fault of the appellant himself, and its admission is no ground for quashing the conviction.

THE LORD CHIEF JUSTICE: The sole question raised in this appeal is whether there was sufficient evidence to support the conviction. At the trial the appellant, very unwisely, misled his counsel about his past career, and questions were put to a police witness which led to evidence being given of some previous convictions. There is no doubt, in view of the fact that the other evidence adduced by the prosecution was very slight, that the evidence of the previous convictions must seriously have prejudiced the appellant. That, however, was entirely his own fault, and, in any event, all we can do now is to consider whether there was sufficient evidence to support the conviction. Apart from the evidence of which complaint has been made we feel that we must answer that question in the affirmative, and, therefore, this appeal as far as regards the conviction must be dismissed. Nor can we interfere with the sentence, which cannot be said to be too severe.

Appeal dismissed.

G. B.

The Court (The Lord Chief Justice, Darling and Shearman, JJ.) also sat on August 30th.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

1917
15 *October.*

HYMAN KURASCH (*a*).

Application for leave to appeal against conviction and sentence, and for leave to call further evidence.

Appellant was convicted, before the Acting Deputy-Chairman, on the 7th August, 1917, at the County of London Sessions, of larceny, and was sentenced to twelve months' imprisonment with hard labour. He was indicted together with another man named Stern, a Russian, who was convicted and bound over on condition that he joined either the Russian or the British Army.

The case for the prosecution shortly was that one Zednik met the two men, Stern and Kurasch, and that the latter offered the prosecutor some jewellery for sale. After some considerable time had been spent in bargaining the accused allowed the prosecutor to have the jewellery on condition of his leaving £100 as deposit. The prosecutor went away, obtained the £100, and handed it to the accused. He then went to a pawnbroker for the purpose of having the jewellery valued, and after learning that the real value of the articles, according to the pawnbroker, was only £10 or £12 he returned shortly afterwards to the place where he had left the accused. They had then disappeared. The case for the defence was, shortly, that the transaction referred to was a sale outright, and that there was no question of deposit.

Lort-Williams for the applicant, who was not present. The application for leave to appeal is based upon misdirection by the

(*a*) See p. 13, below.

1917
15 *October.*

HYMAN
KUBASCH.

Darling J.
Avory J.
Sankey J.

judge at the trial. There was no sufficient direction to the jury on the defence put forward by the accused; in particular, the judge did not give a proper direction to the jury on the question of the time when the prosecutor paid a visit to the pawnshop with the jewellery, which was vital to the case for the defence. On this point, the evidence of the most trustworthy witness for the prosecution agreed with that called for the defence. Another important point was that two rings, valued at £50, which according to the defence formed part of the jewellery when handed to the prosecutor, but which he denied ever having received, were bought by the accused on the morning of the day on which the transaction with the prosecutor took place, and were paid for out of the £100 paid by the prosecutor. This point was not clearly put before the jury in the summing up, and the jury were misled.

The Court gave leave to appeal against the conviction and sentence, and directed that a witness from another pawnshop—at which it was suggested that prosecutor had called at about the same time, though he denied it—who was away when the trial took place, should be called.

Leave to appeal and to call further evidence granted.

Solicitors for the Applicant—*Bloomer & Co.*

R. F. B.

HENRY SMITH.

After an acquittal, it is undesirable that the Judge should refer to defendant's character.

Application for leave to appeal against a conviction for larceny at the Central Criminal Court, on September 7th, before Mr. Commissioner Rentoul. The sentence was six months' imprisonment with hard labour.

G. St. J. McDonald for the applicant, who was not present. An incident occurred at the trial which was extremely prejudicial to the applicant. He was tried on one charge and acquitted, whereupon the judge commented adversely upon the verdict of the jury,

1917
15 *October.*

HENRY SMITH.

Darling J.
Avory J.
Sankey J.

and proceeded to read out to them a long list of previous convictions. I immediately protested, and pointed out that the accused was still to be tried on a further charge. The judge apparently was unaware of this fact. The jury were then discharged, and a fresh jury was summoned from another part of the building for the purpose of trying on the second charge. I cannot say that the fresh jury had heard what had taken place in Court; but they might have done so, and the accused should be given the benefit of the doubt.

DARLING J.: The Court has no doubt whatever that in the circumstances the fresh jury who were brought in to try the second charge did not know of the statement made by the judge after the acquittal on the first charge. The judge was apparently unaware when he made that statement, that the accused was still waiting to be tried on another charge. The Court regrets the incident referred to. When once a prisoner has been acquitted the judge has no right to deal with his previous character. Particulars of previous convictions are supplied to a judge so that he may have information to guide him in giving sentence, but he has no right to mention previous convictions after a prisoner has been acquitted. It can lead to no good purpose, and a prisoner might be prevented from obtaining employment. The Court must express its disapproval of the action of the judge, though on the facts of the case the conviction was right, and the application must be refused.

Application dismissed.

Solicitors for Applicant—*Bruce Searle & Co*

R. F. B.

WILLIAM DAVIS.

Habitual criminal.

A previous conviction and sentence for being a habitual criminal dispenses by sub-s. (2) (*b*) *of s.* 10 *of the Prevention of Crime Act*, 1908, *with the provisions of sub-s.* (2) (*a*) *thereof.*

Appeal against conviction as a habitual criminal and sentence. The appellant pleaded guilty, on the 4th September, 1917, at the

1917
15 October.

WILLIAM DAVIS.

Darling J.
Avory J.
Sankey J.

County of London Sessions, to breaking and entering a dwelling-house on August 15th, and stealing certain property therein. He admitted a conviction for felony on the 7th November, 1911. To the charge of being a habitual criminal he pleaded not guilty. He was sentenced by the Chairman to three years' penal servitude and five years' preventive detention.

A. Bryan for the appellant, who was present. The appeal is based on a point of law arising out of the construction of s. 10, sub-s. 2 (b), of the Prevention of Crime Act, 1908. The sub-s. is divided into two parts. The first part provides that on a charge of being a habitual criminal there must be evidence that since attaining the age of sixteen years the accused has been three times previously convicted of a crime, and that he is leading persistently a dishonest or criminal life, and the second part of the sub-s. provides, alternatively, that there must be evidence "that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention." The appellant in this case was convicted on the 7th November, 1911, of larceny, and also of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention. He was released on June 12th, 1916, on licence. My submission to the Court is that it is not sufficient merely to shew that at some time previously—it might be ten or twenty years previously—the accused had been convicted as a habitual criminal, but there must be evidence that at the time of the accusation he was a habitual criminal, that is to say, there must be some evidence to shew that the prisoner was persistently leading a dishonest or criminal life between the date of his release and that of his conviction. There was evidence at the trial that since his release on licence the prisoner did make an attempt to earn a living, and only failed because the person who employed him was forced to give up her business. It is true that he joined the Army in June, 1916, and deserted after serving for about three months. The point put forward by the Crown is that for their purpose they need only prove that the accused has previously been convicted of a crime, and on such conviction found guilty of being a habitual criminal and sentenced to preventive detention.

W. Attenborough, for the Crown, was not called upon.

1917
15 *October.*

WILLIAM DAVIS.

Sankey J.

SANKEY J.: The appellant pleaded guilty to a charge of housebreaking preferred against him at the County of London Sessions on the 4th September in this year. He was seen by a policeman on the 15th August loitering in front of an unoccupied house in Holland Park Avenue. He was subsequently seen to break into the house, and was then taken into custody. After pleading guilty to the charge he was indicted for being a habitual criminal, and to that indictment he pleaded not guilty. The jury after hearing the evidence found him guilty, and he was sentenced to three years' penal servitude and five years' preventive detention. He appeals to-day against that conviction and sentence. The procedure laid down in the Prevention of Crime Act, 1908, was duly complied with at the trial, and the point taken on behalf of the appellant to-day rests on the construction of s. 10 of that Act. His counsel urges that there must be some evidence that the accused was at the date of his last conviction leading persistently a dishonest or criminal life before he can be convicted of being a habitual criminal. It is to be noted that there is a distinct difference between the two paragraphs of sub-s. 2 of s. 10 of the Act of 1908, and in the view of this Court the second paragraph clearly lays down that the Crown need only prove that on a previous conviction the accused was found to be a habitual criminal and was sentenced to preventive detention. This point was decided in an unreported case of *Collins*, heard before this Court in September, 1916. There may be some hardship on the prisoner, but that is a matter which can be dealt with by the Legislature and is not for this Court to decide. The appeal is dismissed, but as the Chairman asked for the case to be argued before us the sentence will run from the date of conviction.

Appeal dismissed.

Solicitor for Appellant—*F. Wildey-Wright.*

R. F. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY

HYMAN KURASCH (a).

1917
22 October.

A conviction will be quashed for non-direction on a vital point of fact. Fresh evidence.

Lort-Williams for the appellant, who was present. The appellant's case is that the charge was an attempt on the part of a disappointed purchaser to get his money back. A question of time of great importance arose in the case. Zednik said he only went to one pawnbroker, Jay, and that he returned to look for the appellant between two and three o'clock. Appellant's case was that he did not go to the pawnbroker until 4.30 p.m., long after the bargain was completed, and that he went at about the same time to Attenborough's also to try and get the goods valued. The time was confirmed by Hall, a witness for the prosecution, at the trial, although he did not say so at the police-court; so the defence could not have been built up on his statement. I have leave to call an assistant from Attenborough's shop on the question of time. The reason why he was not called at the trial is that he was away on his holidays when enquiries were made at the shop, so no information could then be obtained.

Arthur Williams, called by leave of the Court and examined by *Lort-Williams*. I am assistant to Messrs. Attenborough, pawnbrokers. I remember a man coming to the shop in June last and asking me to value a handful of jewels. It was between 4.15 and 5.30; the manager was having tea at the time. I identify Zednik as the man. I refused to value the jewels; we have no valuer's licence.

Lort-Williams. In the summing up no reference was made to this question at all. At the close of it I drew the Acting-Deputy's attention to the matter, and he said a few words to the

(a) See p. 8, above.

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jury suggesting that the matter was of very little importance—thus failing to direct on the weight and bearing of the evidence.

Rowseil, for the Crown. It is not necessary for a judge to put every point for the prisoner in his summing up. The jury had been addressed at length on the point by counsel. It is clear that there were discrepancies in the evidence of all the witnesses, but the matter was one for the jury.

AVORY J.: In this case the prosecutor's story was that the appellant offered him jewellery for sale, for which he asked £150. Thereupon he, knowing nothing about jewellery, said that he must have it valued, and the appellant said that if he took it away he must deposit £100. The prosecutor said that he went away, borrowed the £100, which he deposited with the appellant, and took the jewellery to be valued to Jay, who said it was only worth £10 or £12. He immediately returned and found that the appellant had gone, and at the earliest opportunity gave him into custody. That was the prosecutor's story.

The appellant's story was that, having offered the jewellery to the prosecutor for £150, the latter beat him down to £100, and then agreed to buy for that price; that the prosecutor went away and returned with the £100, which he paid; the transaction being an out-and-out sale.

The question for the jury was, which story they believed, bearing in mind that if they were not satisfied that the prosecutor's story was true they were bound to acquit the appellant. The prosecutor's story was that having deposited the £100 he went to the pawnbroker and returned by three o'clock. On his own evidence it was at the very latest 3.30 p.m. when he arrived home and found that the appellant had gone. He was asked in cross-examination whether he had not gone to another pawnbroker, Attenborough, and whether it was not as late as 4.30 p.m. when he got to Jay's; both suggestions he denied. The case for the appellant was that having bought the jewellery he went at 4.30 to the pawnbroker to see if he had made a good bargain; that he went to two pawnbrokers, first to Attenborough, who refused to express an opinion, and then to Jay. It now appears that an effort was made by the appellant to call a witness from Attenborough at the trial, but owing to the fact that the assistant who saw the prosecutor was away on his holidays, it was impossible

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to get any information. For that special reason we have allowed his evidence to be given to-day. We accept the evidence of Mr. Williams that the prosecutor went to his shop at about 4.30, and the evidence given at the trial shews that he went to Attenborough's before going to Jay's. If it is true that his visits to the pawnbrokers were at about 4.30 it is impossible to reconcile it with the prosecutor's story, and is only consistent with the appellant's version that the visits were made after the transaction was complete. That is the issue which ought to have been submitted to the jury as the real one for their consideration, reminding them that if they were in doubt they were bound to acquit the appellant. Unfortunately the Acting-Deputy omitted to deal with the question of time altogether until he was reminded of it, and then he only said, "Counsel very properly reminds me there was a discrepancy about the time. You will remember that the man from Jay's (whose evidence about the value of the goods would not influence you very much, I think) says that he was going to tea, he believes, when the call was made on him. The evidence for the prosecution is that the call was made very much earlier than that. You heard the evidence, and I do not propose to go into it minutely. You will remember there was a substantial difference in the time, one saying three o'clock the latest, and the other saying about half-past four. Then there is the further evidence that the prosecutor is alleged to have gone into Attenborough's pawnshop with the view to getting these things examined. Gentlemen, you will now consider your verdict." Even then the Acting-Deputy did not point out to the jury that it was the very crux of the matter. He never pointed out that if the prosecutor went to the pawnbrokers at 4.30 it was only consistent with the appellant's story. We are satisfied that if the jury had heard the witness Williams they could not have returned the same verdict, quite apart from the question of the direction given to the jury. For this reason the conviction will be quashed.

Conviction quashed.

Solicitors for Appellant—*Bloomer & Co.*

A. L. B T.

The Court (Darling, Bray and Bailhache, JJ.) also sat on November 5th.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE SANKEY.
AND MR. JUSTICE ROCHE.

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JACK WEST.

Severity of sentence mitigated in view of youth.

This was an appeal against sentence by leave of Roche J. Appellant was convicted on the 20th October, 1917, at the Middlesex Sessions, of office breaking and of being in possession of housebreaking implements by night. He was sentenced to three years' penal servitude for each offence, the sentences to run concurrently.

Appellant in person.

SANKEY J.: The appellant was convicted of burglary in 1914, and was placed on probation; he was again convicted of a similar offence and sentenced to three years' detention in a Borstal Institution. It is evident that he has adopted the profession of a burglar. He says that he wishes to go into the Army, but he is not a fit person to be sent into the Army. The only thing in his favour is his youth, and on that ground alone the Court reduces his sentence to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

ZAVIL BADASH.

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Darling J.
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On a charge of receiving stolen property, whether the jury believe the defendant's explanation or not, the onus *of proof lies on the prosecution. To ignore the evidence for the defence amounts to a misdirection.*

This was an appeal against conviction on matters of law, and an application for leave to appeal against sentence. Appellant was convicted on the 17th October, 1917, at the Glamorganshire Sessions, of feloniously receiving stolen property, and was sentenced to three years' penal servitude.

Ellis Griffith, K.C. (with him *Lovat Fraser*), for the appellant, who was present. The appellant was convicted of receiving copper, brass and lead stolen from the Powell Duffryn Steam Coal Company, Limited, knowing it to have been stolen. The goods had been bought by the appellant, who had been a marine store dealer since 1914. He was arraigned with five men, Jones, Hacker, Curran and Scott, who pleaded guilty to stealing, and Burton, who was tried and convicted of receiving. He was charged with having received the goods from Jones, Hacker and Curran, who had stolen the property, and from Burton, who had received it from Scott.

My first ground of appeal is that there was not sufficient evidence that the property had been stolen from the prosecutors to go to the jury. A submission to this effect was made at the end of the case for the prosecution. Martin, an engineer employed by the prosecutors, stated that the metal had been stolen from his premises, but on cross-examination it appeared that all he meant was that property of a similar character was missing from their premises. He also stated that four men had pleaded guilty to stealing it, all of whom had been employed by the Company.

Secondly, the Chairman misdirected the jury. Counsel for the defence in his speech to the jury quoted *Schama and Abramovitch*, 84 L. J. K. B. 396; 59 S. J. 288; 31 T. L. R. 88; 79 J. P. 184; 11 Cr. App. R. 45 (1914); and the Chairman in his summing up said: "I do not quite understand the legal argument put before you by counsel for the prisoner, but what I do put before you is this—if you believe the story of the prisoner, if you believe

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that he made the inquiries and satisfied himself reasonably that these men were working on their own, and that they were likely people to have all this metal to sell, and that it was their own to sell, and he believed it was their own to sell, you will acquit him: but if you believe the story he tells you, whether reasonable or not, is not true, and that he is telling you a story he knows to be untrue (the point is whether it is true), if you believe that this man was buying all this stuff without making proper inquiries, without satisfying himself whether they were working on their own or not, and without satisfying himself for whom they were working, and did not make any inquiries at all, then you must ask yourselves whether he did not know these men—ordinary workmen coming to him with these hundredweights of stuff—did not know perfectly well it was stolen." He thus put the onus of proof upon the appellant, and failed to put to the jury the principle of law which the Court held in *Schama and Abramovitch* should be put to the jury. In *Norris*, 12 Cr. App. R. 156 (1916), the conviction was quashed because the jury had found that the explanation given might reasonably have been true.

Further, the Chairman failed to call the attention of the jury to points in the evidence which told in favour of the appellant on the question of guilty knowledge, more particularly as to the value of the stolen property. At the police court two witnesses were called who said the prices given for the goods by the appellant were reasonable. They were not called by the Crown at the trial, but were called as witnesses for the defence. The Chairman quoted Martin's evidence of the value, and said: "Those, gentlemen, were the right prices for those metals," but did not say a word about the evidence of the other two witnesses, who were themselves in the marine store business.

The sentence was excessive; the four thieves were sentenced to three months' imprisonment with hard labour, Burton to nine months imprisonment with hard labour, and the appellant to three years' penal servitude. The Chairman said that the appellant had got the other men into trouble, but there was no evidence of this.

Holman Gregory, K.C. (with him *Travers Humphreys*), for the respondents. (He was called upon on the question of misdirection and non-direction on the evidence for the defence.)

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The appellant had given an explanation of his possession of the property; if the jury accepted it there was an end of the case against him; if they did not it was a question for them whether they should convict him. The Chairman put the question to the jury correctly. The stolen property was in Court and filled ten sacks; all of it had been bought from servants of the company. In stating that the prices quoted by Martin were the right prices, he was apparently only quoting Martin's evidence. He did not attempt to deal with the evidence which had been given recently, but read to the jury his notes of Martin's evidence which had been given on the previous day; he read it not with reference to the question of value, but on the issue whether the property had been stolen or not.

DARLING J.: The Court much regrets having to give this judgment, because it thinks there was a very strong case against the appellant, and the same verdict might well have been returned if the summing up had been less open to criticism. But it errs in many particulars. The case for the prosecution was fully put, and often as if it were quite irrefutable. The Chairman made a mistake against the interests of the appellant in saying that the property was found concealed in railway trucks; this was wholly untrue on the evidence. With regard to the value also we cannot accept Mr. Holman Gregory's explanation that he was merely quoting the evidence on the question whether the property was stolen or not. He took the values given by Martin, and said that those were the right prices. Two witnesses had given evidence on that subject on behalf of the defence; their evidence could not be discarded as manifestly absurd, but not a single word was said by the Chairman with reference to their evidence, or as to how it conflicted with the evidence of Martin.

A graver matter perhaps than either of these is to be seen when you look at the whole summing up, where the question between the prosecution and the defence is left to the jury. The truth is that it is always for the prosecution to satisfy the jury by proof that the prisoner is guilty. It is never (with certain statutory exceptions) for the prisoner to prove that he is innocent; the onus of proof remains on the prosecution. The prisoner may often in setting up a defence fail to convince the jury, and the jury may even think that his story is wholly untrue; if that is so,

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it is a great prejudice to him; but it will not do to tell the jury that if they do not believe the prisoner they must convict him, because that leaves out of account the question of the burden of proof. In the present case *Schama and Abramovitch* was quoted; that case must be followed, but it is a mistake to think that the words of that judgment have some sort of sacramental value; the principle, however, remains, and in the judgment in that case it was said (as reported in the Justice of the Peace): "This Court looking not minutely, but broadly at the summing up cannot find any statement of the principle of law, and the jury may have come to the conclusion that once they were satisfied that the appellants were in possession of the property, the burden of proof rested on them of proving the truth of their explanation."

Let us see what happened here. The appellant had given a long and detailed explanation of his possession of the property, and the view of the prosecution had also been put forward. After the counsel for the defence had brought *Schama and Abramovitch* to the Chairman's notice, and had tried to make him appreciate the principle laid down in that and other cases (for that case did not lay down any new principle), the Chairman said: "I do not quite understand the legal argument put before you by counsel for the prisoner, but what I do put before you is this—if you believe the story of the prisoner, if you believe that he made the inquiries and satisfied himself reasonably that these men were working on their own, and that they were likely people to have all this metal to sell, and he believed it was their own to sell, you will acquit him." That is a matter of course, but he went on to say, "But if you believe the story he tells you whether reasonable or not, is not true, and that he is telling you a story he knows to be untrue (the point is whether it is true), if you believe that this man was buying all this stuff without making proper inquiries, without satisfying himself whether they were working on their own or not, and without satisfying himself for whom they were working, and did not make any inquiries at all, then you must ask yourselves whether he did not know these men—ordinary workmen coming to him with these hundredweights of stuff—did not know perfectly well it was stolen. That is the question for you to decide." He said there plainly in a direction which is not very clear that the point was whether the appellant's story was true. That was not so; the

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question for the jury was whether they were satisfied that the prosecution had made out its case. We consider that the Chairman did not anywhere so express himself as to enable the jury to apply their minds to the crucial point in the case. The nearest he came to it is when he said: "If after considering all the matters I have put before you, you think you are satisfied that he knew these things were stolen, it will be your duty, whether the offence is a serious offence or not, to say he is guilty." That very ambiguous sentence does not in any way cure the worse than misdirection which precedes it, and we have no alternative but to allow the appeal on the ground that there was a fatal misdirection which resulted in a mistrial.

Conviction quashed.

Solicitors for the Appellant—*Hanson and Nash*, Swansea.

Solicitors for the Respondents—*Bell, Brodrick and Gray*, Agents for *Kensholes and Prosser*, Aberdare.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, MR. JUSTICE AVORY, MR. JUSTICE SANKEY, AND MR. JUSTICE ROCHE.

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16 *November.*

JOHN IMMER.

HECTOR GEORGE DAVIS.

The rule that a summing up must carefully put the defence is especially strict when defendant is not represented by counsel.

Principles of direction to a jury discussed.

The property in surplus rations issued by the Government to interned prisoners does not (semble, *presumably*) *pass to the latter.*

Appeals against conviction on law.

The appellant, John Immer, was convicted on October 9th before the Chairman at the Middlesex Sessions of larceny, and was sentenced to twelve months' imprisonment with hard labour. On the same occasion the appellant, Hector George Davis, was convicted of receiving and was sentenced to the same term.

This appeal was partly heard on November 5th, and referred to a fuller Court.

The appellants were present.

Valetta for the appellant Immer. Immer was a German prisoner interned at Alexandra Palace and Davis was a contractor who supplied certain goods to the camp, principally greengroceries, for which purpose he had to call almost daily. The story told on behalf of the prosecution was that on one occasion, when he was supposed to have called for some "empties," Davis was found to have in his van two cases containing 234 lbs. of rice and tea, which had been provided by the Government for the rations of the interned prisoners. He denied all knowledge how the goods came in his van. Immer, who had been appointed by his fellow prisoners manager

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of the Kitchen Committee of the "C" battalion of interned men, said that the rice came from his canteen (or kitchen), and represented accumulated rations which had been offered to and rejected by the members of that battalion; that his committee had told him to give it to Davis, and that he had believed that it was the property of the interned prisoners, and that the committee could dispose of it on their behalf. It is submitted that the trial of the appellants was unsatisfactory and that the summing up of the Chairman did not put the defence fairly or adequately before the jury. Immer's case was that he honestly thought that he had a *jus disponendi* over the rice, but not one word was said in the summing up in regard to the state of his mind. Moreover, it was suddenly suggested that the surplus of rice was created by certain of the prisoners having been defrauded of their full rations. That case had to be met without warning or preparation, and the appellant was greatly prejudiced in the eyes of the jury. In summing up a case to a jury a judge must indicate clearly the case for the defence. The summing up in this case contained four pages pointing to the appellants' possible guilt and three lines relating to an abstract proposition of law, namely, that if Immer believed he had the right to dispose of the rice, even if that belief was erroneous, he could not be convicted of larceny.

Turrell, for the appellant Davis. The appellant's case was not fairly put to the jury in the summing up. Davis's defence was that he knew nothing about the rice until it was found in his van. There was no evidence to controvert his statement on that point. In other words, the prosecution failed to shew that Davis received the goods knowing them to have been stolen, that he saw them put on his van or knew that they had been so dealt with.

Roome, for the Crown, was not called upon.

DARLING J.: It is unnecessary again to recite the facts of this case. It was at one time contended that the property in the rice had, when it was placed on Davis's van, become the property of the interned prisoners, and that they could do what they liked with it. The Court is clearly of opinion that that was not so. It is unnecessary to state the moment when the rice would have ceased to be the property of the Government and to become that of

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the prisoners. The ground on which the summing up is impeached is that the Chairman did not fairly or properly put to the jury the evidence which had been given for the defence. There is no doubt about the rule which the Court has to apply.

In *Hill*, 22 Cox C. C. 625; 76 J. P. 49; 28 T. L. R. 15; 105 L. T. 751; 7 Cr. App. R. 26, 1911, I said: "The only ground on which we could refuse to quash the conviction is that contained in the proviso to sect. 4 (1) of the Criminal Appeal Act. But the principle on which that proviso must be interpreted is laid down in a well-known passage in the judgment of the Lord Chief Justice in *Stoddart*, 2 Cr. App. R., 1909, at 245; and *Dinnick's* case 74 J. P. 32; 26 T. L. R. 74; 3 Cr. App. R. 77, 1909, lays down that it is a paramount principle of law that the defence must be put fairly before the jury. Here it is not put at all fairly; the learned Recorder put another defence which, perhaps, he thought was better."

In *Stoddart's* case Lord Alverstone said (at p. 245): "Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection. To quote Brett, M. R.'s words in *Abrath* v. *The N. E. Rly. Co.*, 11 Q. B. D. at 453, 1883: 'It is no misdirection not to tell the jury everything which might have been told them.' . . . . 'Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen . . .' but 'to deal with valid objections to matters which may have led to a miscarriage of justice.'" That is the rule which we must bear in mind in considering this, or any other, case, and a distinction must be made between instances where accused is represented by counsel and where he is not. See *Totty*, 10 Cr. App. R. 78; 24 Cox C. C. 227; 111 L. T. 167, 1914, where Lord Reading said: "A judge should take care to point out all that there is to be said for the defence, especially when the prisoner is undefended by counsel." It is, therefore, obvious that it is more necessary for a judge to sum up a case to a jury fully, and to explain to them the exact position when the defence has only been conducted by the accused than it is when the accused has been represented by able counsel who may be

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relied on to take every possible point and to use every conceivable argument on his behalf. Counsel in this case have satisfied us that they did everything that could be done on behalf of the appellants.

What is the real grievance in regard to the summing up? It is true that there was in it considerable mention of complaints that had been made of deficiency of rations for "C" battalion. We do not think that the Chairman behaved unfairly in that matter, because it was examined in many places when Mr. Valetta, on behalf of the appellant Immer, had requested that it should be investigated and cleared up. It is true that, in the rest of the summing up, the Chairman did not go through all the evidence and deal with every point separately. He said at the beginning that he did not propose to do so because the jury had heard all the evidence, and also had listened to counsel's speeches. Certainly he said that the position relied on by the defence was a difficult one to take up, but he did not say that it *could* not be taken up, and a judge is entitled to say to a jury, in reference to the defence: "There is a difficulty in believing that [the defence] in view of so and so." Applying the principles which I have read from the authorities, and regarding the summing up as a whole, and not taking a word here and a line there and divorcing them from their context, we have come to the conclusion that the summing up in this case did not violate the rules laid down by this Court, although we do not say that it was a model summing up. A summing up is sufficient if it is not unfair to the accused and if points are not withheld which it is reasonable to suppose are not already properly before the jury. These appeals must, therefore, be dismissed.

Appeals dismissed.

Solicitors for the Appellants—*Forbes and McLean; Charles and Dayrell.*

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE ROCHE.

JOHN BAILEY.

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19 *November.*

Possession of stolen property three months after the larceny may be evidence of receiving, but is very weak evidence of housebreaking with intent to commit larceny.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted on the 15th October, 1917, at the Durham County Sessions, of shop-breaking, and was sentenced to five years' penal servitude.

Thesiger for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was tried on an indictment which charged him and a woman said to be his wife with breaking and entering a small jeweller's shop in Gateshead, kept by a Mrs. Carr, and stealing therefrom a considerable quantity of watches and jewellery, and in a second count with receiving those goods knowing them to have been stolen. The jury returned a general verdict of "guilty" against the appellant. The shop was broken into on the night of the 17th–18th May, 1917, and nothing was heard of the stolen articles until the latter part of August, when Mrs. Carr professed to identify a large amount of them in the window of a shop kept by the appellant in Glasgow. In fact, in evidence-in-chief she did not identify a single article, but only the hangers and tickets attached to them; the former she admitted were of a common kind which could be bought anywhere, but the tickets, she said, her husband had cut and printed. She was cross-examined in detail by the prisoner with regard to the different articles, and one or two she did clearly identify. I must admit that

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there was evidence on which the appellant could be convicted if the jury had been properly directed, but my ground of appeal is that the Chairman misdirected the jury, and that the trial was in other respects unsatisfactory. While the appellant was cross-examining the witness the Chairman said: "The gist of this case is the finish of these tickets, which were actually made and written by her husband, and the question you have got to answer is how they came to your shop in Glasgow and this particular lady's watch; we are deciding whether you broke into her shop, we are not deciding whether the jewellery is hers or yours." I submit that the foundation of the case for the Crown was possession by the appellant of goods which had been recently stolen, and that therefore it was a vital question who was the owner of the jewellery.

The appellant gave evidence at length in which he explained that he had been buying watches and jewellery since the beginning of 1916, and by the end of May had accumulated sufficient to open his shop: that since then he had continued to buy watches, &c., and he gave the names of various auctions which he had attended for this purpose. He explained that he had tried to get witnesses from the auctioneers to confirm this, but as they were in Scotland he could only get them to attend by tendering their expenses, which he could not afford; he also said that he found they kept no records of sales or purchases, and therefore could not assist him if they did attend. He said in terms that his defence was that he had bought the jewellery in question not knowing it to have been stolen. He also stated that he himself had printed the tickets which Mrs. Carr had identified, and pointed out that they had been cut by a machine. The Chairman thereupon said that Carr might have had the machine to cut the tickets, a most improbable suggestion, as I am instructed that the tickets were of different shapes, each of which would require a different machine, and that each machine would cost some £20. His fellow-prisoner also gave evidence in corroboration of his statements.

I submit that there was no evidence whatever to go to the jury on the charge of housebreaking. The appellant was, according to the evidence, living at Newcastle-on-Tyne at the time of the offence, and it was said that the house at which he lodged was a mile from Mrs. Carr's shop, but there was no other evidence suggested beyond possession of stolen goods three months after they

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were stolen. Such possession would not justify a conviction for housebreaking.

On the issue of receiving, the Chairman misdirected the jury. His summing up was practically a speech for the prosecution, and he barely touched on a single point put forward by the appellant. He failed to give the jury any direction whatever on the law of receiving, or to direct their attention to what the evidence against the appellant really amounted to. A mass of articles were in court, only a very small number of which had been identified by Mrs. Carr; the Chairman should have drawn the attention of the jury to that fact, otherwise the mere presence of such an amount of jewellery in court was most prejudicial to the appellant; he should have also explained to the jury what explanation the appellant had given of his possession of such articles as had been identified. The failure of the Chairman to do so amounted to non-direction amounting to misdirection. He told the jury that they had to ask themselves whether they believed Mrs. Carr or the prisoners; this was a positive misdirection, because it disregarded the decision of this Court in *Schama and Abramovitch*, 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. App. R. 45, 1914. He should have directed the jury properly on the *onus* of proof.

The sentence was excessive. It is true that the appellant had been convicted seven times before, but there were intervals between the convictions which seem to shew that he was not a persistently dishonest man. His last conviction was in February, 1913, when he was sentenced to eighteen months' imprisonment with hard labour; he had therefore apparently lived honestly since the end of 1914. Further, a witness for the prosecution stated that the appellant had been doing good and regular work on munitions. He had never been sentenced to penal servitude before, and I submit that a sentence of three years would be sufficient now in the circumstances.

Kendal-Grimston, for the Crown, was not called upon.

AVORY J.: On the 17th May a pawnbroker's house at Gateshead was broken into by means of a hole cut from the adjoining house, and a quantity of jewellery and watches were taken away. The appellant was in fact at the time living in rooms a mile from the

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shop, and on the following day he disappeared. None of the property was recovered until August, when a detective went to a shop kept by the appellant and his wife in Glasgow. The appellant was not in, but his wife said that he would be back by six o'clock. The detective returned at six, when he found the premises locked up, and from that time the appellant disappeared, until he was arrested some time afterwards. Mrs. Carr, the owner of the pawnbroker's shop, subsequently identified a large amount of the property found in the appellant's shop as hers. Mr. Thesiger very properly admits that there was evidence on which the jury could convict the appellant of receiving; he also very properly urges that there was no evidence on which the jury, if properly directed, could convict him of housebreaking. It is true that in some cases where the housebreaking takes place one day and the property stolen is found in the possession of the prisoner on the following day, it is open to the jury to infer that he broke into the premises, but not where he is not found in possession until three or four months later; it may, however, be evidence that he was guilty of receiving the goods knowing them to have been stolen. The Chairman drew no distinction between the charges; he more than once reminded the appellant that he was charged with the housebreaking, and that that was all he need trouble himself about. It was only at the conclusion of his summing up that he said: "It is open for you to say whether you find either or both of them guilty of breaking and entering this shop, or either or both of them of dealing with these things and receiving them knowing them to have been stolen." The jury returned a general verdict of "guilty," and in the opinion of the Court there was no sufficient evidence on which the appellant could be found guilty of housebreaking, and therefore the Court quashes the conviction on that account.

There remains the question whether on the evidence, and the direction to the jury, the appellant could properly be convicted of stealing. Mr. Thesiger has pointed out that there was a dispute between the appellant and Mrs. Carr about the identification of many of the articles, some of which she identified by the tickets which were still on them, some by private marks, and some by marks which she had herself put on. The appellant disputed the identity of substantially all the articles, and gave an account how he came into possession of them. He said: "As I have said,

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my defence is that I bought this jewellery since, and bought it not knowing it to be stolen. I said to you that a great amount of that jewellery was bought over a year ago at these auctions, and that I had the whole lot a long time beforehand. On the other hand, I have been buying watches, and the police have told you, I think he did tell you, that I had not many in when I opened the shop. I have been buying watches since I opened the shop; I only had about nine at that time. In June and July I was buying at about six auctions every week." That was his case. Now Mr. Thesiger says that there was no proper direction to the jury on the law of receiving. Assuming that the jury were told that the offence consists in receiving the property knowing at the time of receiving it that it had been stolen, it used to be thought that that was the sum and substance of the law on the point; but in a particular case a man, on being arrested, gave there and then an explanation of his possession, and the judge told the jury that unless they came to the conclusion that his story was true they must convict him. That was the case of *Schama and Abramovitch*. It is sometimes lost sight of that that was the whole point in that case. The present is not a case of a man when found in possession giving an explanation of his possession. He ran away, and only when he came to trial attempted to give an explanation. The Chairman said: "If you believe Mrs. Carr, the tickets attached to this jewellery and some portion of the jewellery were found in a shop in Glasgow which they opened ten days after the crime was committed. When it was going to be brought home to them and the police see Mrs. Bailey, Bailey himself disappears, and during that time he is in Manchester. His explanation of that is that he went to see relatives, as Manchester is his home. I think it is a subject for consideration that he should have gone to Manchester, and should be pawning two watches which Mrs. Carr identifies with absolute certainty as her property. He does not pawn them in his own name, but has pawned them through somebody he appears to have met in the street, and whose name or anything else about her he did not know. You have got to take all these things into consideration and ask yourself whether you believe Mrs. Carr, or whether you believe the prisoner and the female prisoner." Then he concludes: "It is open to you to say whether you find either or both of them guilty of breaking and entering this shop, or either or both of them of dealing with these things and receiving

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them knowing them to have been stolen." The whole question was whether the jury believed Mrs. Carr or the appellant, and taking all the facts into consideration, it is obvious that there was evidence on which they could convict, and the Court is of opinion that there was no misdirection or non-direction which amounted to misdirection, and that therefore there is no ground for disturbing the conviction for receiving.

As regards sentence, it is true that for four years there had been no conviction recorded against the appellant, but it is also true that notwithstanding his previous convictions he had found honest work and was earning good wages: yet he made himself a party to a serious crime, so there is not the same reason for extending mercy to him as to some other persons. The Court sees no reason for reducing the sentence.

Conviction for housebreaking quashed.

Appeal against conviction for receiving and against sentence dismissed.

A. Ł. B. T.

HERBERT LIONEL HAMILTON.

The Court may give leave to cross-examine a witness on matters of credit which could not be the subject of contradiction at the trial.
If a direction is wholly insufficient a conviction may be quashed.

This was an appeal against conviction, by leave of Roche J., and an application for leave to call further evidence. Appellant was convicted on the 17th October, 1917, at the Lincolnshire Quarter Sessions, holden at Kesteven, of feloniously receiving stolen property and of being an accessory after the fact to larceny. He was sentenced to four months' imprisonment with hard labour.

Hawke, K.C. (with him *Horton Smith*) for the appellant, who had been granted bail. The appellant was a motor engineer who had a garage opposite to his private house, and has hitherto been regarded as perfectly respectable. His son was called up for naval

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service and joined the Royal Naval Air Service; he was stationed at the depôt at Cranwell. While there he got into bad company, and stole some motor accessories, some of which he sent to the appellant's house, and others to a store-room at his garage, where they were found. The explanation given was that the son, who had undoubtedly been in business on his own account at a very early age and made some money, told the appellant that he had arranged to go into partnership after the war, that he had bought some goods, which he was going to send home, and that the appellant believed him. The main witness for the prosecution was one Jarvis, who gave evidence on which the appellant could be convicted if the minds of the jury had been properly directed to the issues. Jarvis described himself as a motor engineer, and said that he had an establishment of his own in Edgware Road, and that he had been trained at Wembley. In cross-examination he said that the business was carried on under the name of Jarvis & Co. at 374, Edgware Road; that it was a limited company in the hands of his family, he being managing director; that the capital was £500; that it was established three and a half years ago, and turned into a company when he had to join up; that his children, whose ages were five and a half and four, held two shares each. I ask leave to call evidence to shew that this is all untrue. He is not called Jarvis, but Jacobs; he has no business at the address given. There is a motor business of that name at 205, Edgware Road, with which Jarvis has nothing to do. He was only married in 1915 I agree that this evidence could not have been called at the trial, as the questions went to credit only.

[DARLING J.: Whether you can call the evidence here is a difficult question which the Court does not wish to decide, but the point might be met by giving you leave to cross-examine Jacobs.]

Harold R. Jarvis was called and cross-examined by *Hawke, K.C.* He admitted that most of the statements referred to were untrue, and explained that he had been sent by the authorities to make enquiries of the appellant. To give confidence he stated that he was connected with Jarvis & Co., and thought it best to adhere to this story at the trial.

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Hawke, K.C.: The Chairman misdirected the jury; he told them that the whole question was whether they believed Jarvis or the appellant: there were many other questions for them to determine. No direction was given on the question of being an accessory after the fact; the Chairman only mentioned to the jury that there was such a count in the indictment. The case came directly within the decision of *Schama and Abramovitch*, 34 L. J. K. B. 396; 112 L. T. 480; 77 J. P. 184; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. App. R. 45, 1914; and *Badash*, 13 Cr. App. R. 17, 1917.

Cracroft for the Crown: Assuming that Jarvis was untrustworthy, the evidence of the police and the admissions made by the appellant justified the jury in finding that the appellant dealt with the goods with guilty knowledge. The appellant admitted offering some of the goods for sale at prices much below their value. I cannot say that the direction given to the jury was satisfactory. The count for being an accessory after the fact was inserted to meet the possible suggestion that the goods, which had been brought to the house in a nailed box, had been innocently received, while the appellant might have had guilty knowledge after the box had been opened by the son. I cannot pretend that the jury were adequately directed on the law on that point; the evidence justified a conviction for receiving if at all.

DARLING J.: In this case a good many points have been taken, but we think that a sufficient reason why the conviction must be quashed is that the direction to the jury was inadequate, seeing what evidence was given in the case. The Chairman really did not tell the jury what the questions were which they had to decide. He did not tell them to say whether or not the appellant was in possession of the goods; the mere fact that he was dealing with goods left on the premises by his son was not sufficient. Then he said that the main question to be decided was whether the appellant or Jarvis was speaking the truth. He gave no kind of indication to the jury that it was the duty of the prosecution to prove the appellant guilty, and so to make out their case that there should be no reason to doubt it. He did not tell them that if they did not know which story was true they should acquit the appellant. Besides, at the very end of his summing up he said: "I will leave it in your hands which of the two men's evidence you will think

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is the true one. There are two indictments against the prisoner, one for receiving and another for being an accessory after the fact of the larceny. You can return a verdict on either one or on both; I thought I would call your attention to that fact," again a totally insufficient direction. The jury thereupon found the appellant guilty on both counts. There was not the slightest explanation of what matters they must be satisfied of to convict of receiving, and not a word about what it was necessary to establish to prove that the appellant was an accessory after the fact.

Mr. Hawke desired to read passages from the judgment in *Schama and Abramovitch*. That case has become a positive nuisance. It was decided on particular facts, and was a perfectly proper decision on those facts, but it is not of universal application. We hope that in future counsel will pay attention to what that case really decided.

Conviction quashed.

Solicitors for the Appellant—*Radford & Frankland* for *J. Lord Thompson,* Brighton.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE McCARDIE.

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JOHN BACON.

On a charge of receiving with guilty knowledge the direction to the jury must not ignore a defence that the receiving was innocent.

Appeal against conviction and sentence.

The appellant, John Bacon, was convicted on October 18th, before the Deputy-Chairman, at the Maidstone Quarter Sessions, of receiving, and was sentenced to six months' imprisonment with hard labour.

H. C. Dickens for the appellant. The appellant was charged with a man named Millard with stealing and receiving two sacks of cement, the property of J. H. Sankey & Sons, Ltd., a firm of builders' merchants. In effect, Millard was charged with stealing the cement and the appellant with receiving it. Millard was a carman employed by the prosecutors, and on August 23rd, 1917, he gave to his employers an order for a quantity of sand on the form used by the firm, but, the prosecution alleged, he placed in his cart, not only the sand, but also two sacks of cement. He was seen to drive to the appellant's premises, go inside, come out after three or four minutes, and then drive to a house where the appellant was carrying out some building operations. There he deposited the sand and the cement. The appellant's story was that he had had many transactions with Sankey & Sons, that he had been in the habit of giving Millard orders for materials which he required, that he had previously to August 23rd told him that he wanted some sand and two sacks of cement, and that, when the cement was delivered, he assumed that the whole matter was in order, and that Millard had passed the order for the cement to the firm in a

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perfectly lawful and proper manner. In summing up the Deputy-Chairman put the case for the prosecution fully and fairly before the jury, but he made no mention of the case for the defence, except to say: "You have heard the rather complicated reply of Bacon, and it is for you to judge on the evidence which has been before you as to that." He continued, in regard to the law: "As counsel has reminded you, if anyone is found in possession of recently stolen goods, it is for him to give an explanation of a reasonable character to explain that possession. If you are of opinion, in the first place, that Millard is guilty of stealing that cement, and Bacon was found in the possession of it, if you are satisfied with the evidence of Bacon that the learned counsel put before you, if you are satisfied, it will be your bounden duty to acquit him. But if, on the other hand, having heard all the evidence on one side and the other, you are of opinion, and have no doubt, that, in the case of Millard, he has been guilty of stealing, and, Bacon, of receiving, it will be your duty to find them guilty." It is submitted that that direction lacked all the essentials to a good direction in a case of receiving.

C. M. Pitman, for the Crown. No fault can be found with the summing up, although it is not as long as it might have been if there had been any dispute between counsel in regard to the law applicable to the case.

AVORY J.: The question which the Court has to decide is whether there was such an adequate direction to the jury as to justify our refusing to set aside the verdict of "guilty" at the trial. On the evidence it was possible that Millard was guilty of stealing the property, but that Bacon, when he received it, did not know that it had been stolen. Millard might have stolen the cement from his employers intending to take money from the appellant for it, and to put it into his own pocket. It was a tenable view that Bacon received the cement believing it to be delivered pursuant to his order, and that Millard had become possessed of it in a proper way. That point was never put to the jury by the Deputy-Chairman. Undoubtedly, the effect of the summing up was to throw on the appellant the burden of satisfying the jury that he was innocent. The Court might not have had to find any fault

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with that direction if the real defence of the appellant had been put to the jury, but it was not, and therefore the conviction cannot stand.

Conviction quashed.

Solicitors for Appellant—*Frost, Ward & Co.*

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

DOROTHY GERTRUDE ELLEN LEE
FLORENCE ANNIE PARKES.

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3 *December.*

When it appears that the defence of each of two persons jointly indicted is incrimination of the other, the Court favours a separate trial of each.
When a statement is objected to as evidence, the judge should not give any indication of its contents before it is admitted.

Application by Lee for leave to appeal against conviction and sentence (treated as a final appeal), and appeal against conviction on law.

The appellants were convicted on November 6th, 1917, before Lord Coleridge J., at the Exeter Assizes, of manslaughter, and were respectively sentenced to nine months' and six months' imprisonment in the second division. The appellants were not present.

Percival Clarke for the appellant Lee (under s. 10 of the Criminal Appeal Act, 1907): Lee was an unmarried girl of seventeen years of age. She became pregnant, and her mother arranged for her to go for her confinement to the house of Parkes in Exeter, who was a certified midwife. She went to Parkes on May 22nd, 1917; on June 14th the child was born, and during the night of August 11th—12th it died. The medical testimony shewed that death was due to starvation. Though Lee's counsel applied for a separate trial, the appellants were arraigned together for the manslaughter of the child. It is submitted that the trial of the appellant Lee was prejudiced by Parkes being tried at the same time, by the defence which was set up on behalf of Parkes, namely,

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that Lee had wanted to get rid of the child, and had failed to give it the food which Parkes provided. If Lee had been tried separately, Parkes would not have been called as a witness, and these contentions would not have been before the jury. Lee's defence was that Parkes did not give her sufficient food, and that she, therefore, was unable to feed the child adequately at the breast. It appeared on the depositions that each defendant was trying to throw the blame on the other. In summing up, the judge indicated to the jury in a way adverse to the appellant the evidence of Parkes in regard to these matters.

W. T. Lawrance for the appellant Parkes (under s. 10 of the Criminal Appeal Act, 1907): The jury, in addition to being asked to return a general verdict, were required to answer certain questions. From their replies it appears that they acquitted Parkes of failure to supply Lee with sufficient food, but found that she "culpably neglected to summon medical aid" when the child was seen to be ill, and that "the child died in consequence of such neglect." It is submitted that on August 11th or 12th there was no duty on Parkes to summon a doctor for the child. It had been arranged that Lee should be left in her care for a month after the child was born. That month ended on July 14th, and, after that date, the relations between the appellants ware those of landlady and lodger, and not those of nurse and patient. In summing up the judge failed to direct the jury in regard to the meaning of "culpable negligence" applied to Parkes as opposed to Lee. He referred to *Nicholls*, 13 Cox C. C. 75, 1874, and *Senior*, 1 Q. B. 283; 68 L. J. Q. B. 175; 19 Cox C. C. 219; 63 J. P. 8; 79 L. T. 562, 1889: C. C. R.

T. H. Parr for the Crown: In regard to Parkes it is submitted that, on her own evidence, it is clear that up to almost the last moment of the child's life she was acting as nurse, whatever may have been the arrangement originally come to between her and Lee's mother. There was, indeed, evidence that that arrangement was that Lee should remain indefinitely with Parkes until a home was found for the child. [He was stopped by the Court.]

DARLING J.: The Court is of opinion that the appeals of both appellants should be dismissed. At the same time, we desire to

express the opinion that it would have been better if the trial judge had acceded to the application of counsel for separate trials. The course which was followed certainly made Lee's defence much more difficult, for if her case had been dealt with first, Parkes would probably not have been called as a witness. In our view, there was ample evidence that Lee had been guilty of culpable neglect, which brought about the death of the child. There is a passage in the summing up to which exception might be taken. Referring to a statement made by Lee to her solicitor, to evidence of which Lee's counsel had objected, the judge said: "We must suppose that as the learned counsel for Lee objects, and as Parkes's counsel prays for it [the admission of the statement], it would be something which would help Parkes and would not help Lee." That was, really, giving to some extent what the judge supposed to be the effect of the contents of a document which was not in evidence. If we thought that it was reasonable to suppose that the incident had any effect on the jury and that it turned the balance against Lee, we should have to allow her appeal. But we think that was not so. It was a very small incident, and, if necessary, we should exercise the discretion given us by the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, as we are satisfied that no substantial miscarriage of justice has occurred. In regard to Parkes, the summing up may not have been so clear as might be desired, but, in view of the direction which was given and the evidence of Parkes herself, we have come to the conclusion that there was ample evidence that at the relevant date she was acting as a nurse with control over both mother and child. She had not exclusive charge of the child. Both she and Lee had duties in regard to it. There was evidence to justify the verdict of the jury.

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Appeals dismissed.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE COLERIDGE.

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10 & 11 *Dec.*

GEORGE HARRY BISHOP.
BENJAMIN GOLDBERG GRANTWAY

A man is "liable to military service" within s. 1 of 5 & 6 Geo. 5, c. 104, the Military Service Act, 1916, though he holds temporarily a certificate of exemption.

Appeals against conviction on points of law.

The appellants were convicted, on October 19th, 1917, before Mr. Justice Shearman, at the Central Criminal Court, of conspiracy to defeat the provisions of the Military Service Acts, and were each sentenced to twelve months' imprisonment. On October 31st, 1917, before Mr. Justice Salter at the same Court, the appellant, Grantway, was convicted on a further charge of conspiracy, and was sentenced to twelve months' imprisonment, to run concurrently with the former sentence.

Hawke, K.C. (*Huntly Jenkins* and *Purchase* with him), for the appellant Bishop, who was present: The appellant is a doctor practising in the East End of London, a man, admittedly, of high character and prosperous financially. It was alleged by the prosecution that he had conspired with the appellant Grantway to issue a false certificate concerning the physical condition of a man named Bennett and to dope him with a view to securing his rejection on the ground of unfitness by a military recruiting medical board. Bennett was taken to Bishop by a man named Trichter, and Bishop gave him a thorough examination. He then asked him whether he drank to excess, and gave him a certificate to the effect that the heart was dilated with the apex displaced, and the liver

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was enlarged, and that there was a trace of sugar in the urine. He knew that the certificate was to be taken to a Harley Street specialist. The latter confirmed his view and took a more serious view of the case. Later, Trichter told Bennett that the certificates were of no use to him and that he ought to get himself "poisoned," and that he knew a doctor who would give him the necessary drug. Another visit was paid to Bishop, and the prosecution alleged that he (Bishop) gave Bennett some tabloids made from the thyroid gland of sheep and prescribed an excessive dose, which would have a very bad effect on the heart. The appellant's contention was that the tablets were the right treatment for the malady which he honestly considered that Bennett was suffering from and that he prescribed a perfectly proper dose. In summing up the case to the jury the learned judge did not deal fairly with the medical evidence, and the trial of the appellant was thereby prejudiced. The judge misdirected the jury in regard to the condition of Bennett's heart. He took the view that Bennett was free from drink, thereby implying that the condition of his heart was due to the thyroid. That view was erroneous, because there was evidence that Bennett had been drinking alcoholic spirits to excess. Another misdirection was that the judge stated to the jury that the prosecution suggested that the appellant had a string of cases of the same kind at a guinea a head. He did not point out to the jury that there was no evidence to support such a suggestion. The learned judge further failed to direct the jury on that part of Sir James Mackenzie's evidence in which he admitted that the conditions he found in Bennett were probably the result of causes existing at dates before it was alleged that Bishop prescribed the thyroid gland for Bennett, and further the complaint made is that the judge omitted to draw the attention of the jury to certain facts which were important points in the case for the defence.

Then, there is the question whether the case ought to have gone to the jury at all. The indictment alleges a general conspiracy to evade the Military Service Acts. There was no evidence against Dr. Bishop, except that he is alleged to have doped a man who was not within the Acts referred to, because Bennett was not at that time liable to military service as he was in possession of a certificate of exemption.

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Reading L.C.J. Avory J. Coleridge J.

[AVORY J.: Is a man who is temporarily exempted from military service, liable to military service?]

No, at all material times Bennett was exempt. He was not liable to military service at the time in question. His certificate of exemption was still in force. See s. 1 of the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104). See also sched. 1 of the same Act, paragraph (6).

[AVORY J.: Is there not a distinction between a man who is "deemed to be enlisted" and a man who is "liable to military service"?]

The question is whether he was liable to military service at the time in question. He held a certificate of exemption from the Home Office which was conditional on his remaining in the Special Constabulary.

[The LORD CHIEF JUSTICE: It may be that he is a man liable to military service, but that he is exempted so long as he continues to be a Special Constable.]

The effect of the Military Service Acts is that he was excluded from their operation for the time being. It is submitted that anything done while a person is exempt from the operation of the Military Service Acts, even though it may be done with the object of evading future liability, cannot be held to be a conspiracy to evade the Military Service Acts.

[The LORD CHIEF JUSTICE: Is a liability the less because it is a liability to pay in the future?]

Under the bankruptcy laws such a liability would have to be declared, because the statute so provides. But, take a bill of exchange, payable in three months. Judgment could not be obtained to-day on such an instrument. It is not a conspiracy to take tea or wine out of bond just before the introduction of the Finance Act because of the possibility of additional duties being imposed. Conspiracy to evade the Military Service Acts is not shewn where you prove nothing but the overt act of doping a man

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who is not liable to the Acts. The appellant was charged with a conspiracy to defeat the Military Service Acts, and the only evidence against him was that he did something to someone who was not liable to the Military Service Acts at the time, and who might not become liable to them. The summing up was of such a character as to divert the minds of the jury from the real points of the case, and it did divert their minds in favour of the prosecution.

Lort-Williams for the appellant Grantway, who was present. Bennett was not within the provisions of the Military Service Acts and there was, at the time of the alleged conspiracy, no certainty that he ever would become liable to military service. Many things might have happened while his certificate of exemption remained in force which might cause him never to become subject to the Acts at all. [He cited s. 2 of the Military Service Act, 1916, 5 & 6 Geo. 5, c. 104.] Therefore, there could be no conspiracy to evade the provisions of the Acts. On the other ground of appeal it is submitted that the learned judge did not adequately place before the jury the points of the case for the defence. He created an atmosphere which was unfavourable to the appellant by assuming as proved facts which were not proved. Moreover, the evidence of Bennett, although he was an accomplice, was not corroborated in respect of any disputed fact.

Muir, Travers-Humphreys and *Percival Clarke* for the Crown, were not called on to argue.

The LORD CHIEF JUSTICE: The appellants, Bishop and Grantway, were convicted on an indictment which charged them and another person named Trichter with conspiring together to defeat the provisions of the Military Service Acts, and, in the particulars of the offence, it is stated that that was done by enabling a person, partly or wholly, to evade military service. They appeal against their conviction on two grounds, namely, (1) that the indictment was bad, as the facts found do not constitute the conspiracy charged in the indictment, and (2) that there was misdirection, which, substantially, consisted of a failure to place adequately before the jury the points taken by the defence and in assuming as proved facts which were not proved. The person

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whom they were alleged to have enabled, partly or wholly, to evade military service was a man named Bennett, who was of military age within the meaning of the Military Service Acts, 1916, and who in the ordinary course would have been liable to military service. He had, however, obtained exemption on the ground that he was the sole person conducting a business. His medical classification was C.2. He was a decoy, or a spy, and was employed for the purpose of discovering whether any frauds were being committed on the military authorities to enable persons to evade military service. Bennett was taken to Trichter in the month of April, and in the course of conversation Trichter said that they could get him (Bennett) classified C.3 (sedentary work at home) for £100, and could secure his rejection for £120. On April 13, Bennett was examined by a Medical Board. That examination was a proper examination by the proper authority. He was then passed as fit for general service, but the authorities desired him to be placed in a lower category, and he was accordingly classified C.1 (garrison duty at home). Bennett was an Inspector in the Special Constabulary and he held a certificate of exemption from the Home Office, which was conditional on his remaining in the Special Constabulary. He was, therefore, liable to have his certificate of exemption withdrawn whenever the Home Office considered it necessary in the public interest to do so. A conversation took place between Grantway, Trichter and Bennett which shewed clearly that Bishop was to be asked to give Bennett a medical certificate. It was agreed that a sum of £115 was to be paid and, further, that £10 was to be paid at once in Treasury notes for the medical expenses. That is some evidence that there was a conspiracy. Bennett paid the money and Trichter took him to see Dr. Bishop. A suggestion was then made that Bennett drank eight, nine, or ten glasses of whisky a day. Another doctor, a specialist, was seen, who read Dr. Bishop's certificate and agreed with it. It was stated that Bennett had drunk alcohol freely, chiefly whisky, for twelve years. His heart was dilated and its apex displaced. It was contended that that shewed that Dr. Russell Wells has corroborated Dr. Bishop. It is important, however, to observe that it was not contended, and could not be contended, that there was no evidence on which the jury could have come to a conclusion adverse to Bishop and Grantway.

According to the prosecution, on May 3rd, Dr. Bishop gave

nine pills or tabloids. Bennett was to take three pills three times a day. Each pill contained five grains of thyroid. He was to return the next day. Bennett took six and gave three away. On May 4th Bennett went and got another nine pills, with verbal directions to take six on Sunday, the 6th, and three on Monday before seeing Sir James Mackenzie. Bennett again took six and gave three away. Later he said that he took five out of the last lot of pills on the Sunday. Bishop's evidence was that he gave both boxes of pills, the eighteen, with verbal directions to take one at night and one in the morning. Bennett was examined by Sir James Mackenzie and classified C3. Bennett then paid over £115 to Grantway, £10 to Trichter, and Bishop had guinea fees. When the money had been paid they were arrested and the greater part of the money was found on Grantway and Trichter, but none on Bishop It was not disputed that these notes were in their possession.

It was argued that no offence had been committed, as Bennett was not liable to the Military Service Acts, 1916, and consequently there was no conspiracy to defeat the provisions of those Acts. The point turns on the question whether a person who holds a temporary certificate of exemption can be said to be liable to military service. It is not disputed that Bennett was a person of military age and would be a person liable to military service unless he obtained exemption. The argument was that he was not a person within the Acts. The defence referred to para. 6 of the First Schedule to the first Act. Now, it is true that Bennett held a certificate of exemption and that the certificate was at the relevant time in force. But it is equally true that, under the regulations, he would be liable for service at any moment, if the Home Office chose to withdraw or cancel the certificate. Was he, then, a person who was liable to military service? It is quite plain that Bennett was a person who might be called upon at any moment to render military service, and the appeal on the point of law fails.

On the question of misdirection the Court are of opinion that, viewing the summing up as a whole, it cannot be said that the learned judge did not deal sufficiently with the case for the defence. The crux of the case was the giving of the thyroid pills. There was a strong body of evidence for the prosecution to the effect that it would be very injurious to give these pills to cure an accelerated

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10 & 11 *Dec.*

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Reading L.C.J.

heart. The jury saw Bennett in October and heard the evidence in regard to his condition. Evidently they came to the conclusion that the pills accentuated the condition of his heart. Looking at the summing up as a whole, and not looking at it microscopically, the case was properly put to the jury. There was no misdirection, and there was evidence on which the jury could find as they did. In these circumstances these appeals fail.

Appeals dismissed.

Solicitors: *Stikeman & Co.* for the Appellant Bishop; *W. H. Cowl* for the Appellant Grantway.

G. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE SHEARMAN.

GYPSY BRYANT.

1917
17 *December.*

If an accomplice is treated in the summing up as an absolute witness of truth a conviction will be quashed.

In trials for receiving with guilty knowledge there must be a direction on the burden of proof.

This was an appeal against conviction on matters of law Appellant was convicted on the 22nd November, 1917, at the Central Criminal Court, of feloniously receiving stolen goods, and was sentenced by Mr. Commissioner Rentoul to three months' imprisonment in the second division, and ordered to pay the costs of the prosecution.

Purchase for the appellant, who was present. The appellant lived with one Bryant as her husband, and had in his absence the conduct of a grocery business which he carried on. A traveller named Tozer was in the habit of calling on customers on behalf of Woolley, Sanders & Co., Ltd., and was driven by a man named Westin, who had also driven Tozer's predecessor. The brougham used by Tozer for carrying his goods waited opposite Bryant's shop. About January, 1917, while Tozer was engaged with customers, Westin, who was in charge of the brougham, began to offer the appellant various goods, and she did in course of time buy a considerable quantity of silk, &c. from him. Finally the appellant, Bryant, a porter named Perring, and Westin, were indicted for larceny and receiving; the silks, ribbons, lace, &c. found by the police in Bryant's and appellant's bedroom and identified as the property of Woolley Sanders, were, with a roll of silk found in Perring's hands, said to be of the wholesale value

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GYPSY BRYANT.

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of £130. Westin pleaded guilty; and at the trial of the other three prisoners the jury after two hours' deliberation found Bryant and Perring not guilty, and they were acquitted, but were unable to agree with regard to the appellant. She was therefore put on her trial again about a week later. The grounds of appeal are that although several matters arose in the conduct of the case which made a very careful direction to the jury necessary, no such direction was given; in fact, no direction in law was given at all, and the witness Westin, who was admittedly an accomplice, was held up to the jury as a person whose evidence ought to be accepted against that of the appellant. In the speeches to the jury an acute difference arose between counsel for the prosecution and the defence on the law with regard to the burden of proof in cases of receiving; counsel for the prosecution maintained that when an explanation of possession was given the *onus* was on the defence to prove the truth of the explanation; I told the jury that my view was that the burden of proof lay always on the prosecution, but that they must take the law from the Commissioner and not from me. In spite of this no direction on the subject was given to the jury.

In his summing up the Commissioner said: "It is not possible for anyone to tell what is in the mind of another, and the charge here is having a guilty mind, that is knowing from all the circumstances, as she must have known, that these goods were not properly come by by Westin." This was usurping the functions of the jury. Referring to Westin, he said: "All the way through his statements I think you will consider that his statements seem to hold water and seem to be reasonable." Later he said: "Can you, considering the great obligation that is upon you, say that this case has not been proved up to the hilt?" The whole effect of the summing up was that the jury must convict. He suggested that the appellant had tempted Westin, but there was no suggestion of this in the evidence, and Westin himself gave evidence to the contrary. (He was stopped by the Court.)

Kingsbury for the Crown. It is not the desire of the private prosecutors that I should say anything in this case or press it in any way; they desire to leave the matter entirely to the Court, as they undertook the prosecution solely from a sense of public duty and in the public interest.

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GYPSY BRYANT.

Reading, L C.J.

The LORD CHIEF JUSTICE: The appellant was indicted with Westin, Bryant, and Perring, for stealing and receiving cloth and other articles, the property of Woolley, Sanders & Co., Ltd. At the first trial Westin pleaded guilty, and was bound over; Bryant and Perring were acquitted. The jury were unable to agree with regard to the appellant, and therefore she was tried again. At the second trial the jury convicted her of receiving, and she was sentenced to three months' imprisonment in the second division. She appeals against that conviction on the following grounds: firstly, that the direction to the jury was faulty, as it omitted to give the proper direction with regard to Westin; secondly, that the Commissioner did not give a right direction on the burden of proof in a case of receiving, and further that he expressed himself so strongly on the facts that the appellant is entitled to have her conviction quashed. To deal first with this last point, this Court has often said that the mere fact that a judge expresses a strong view on the facts is not sufficient to entitle a prisoner to have his conviction quashed. A judge is entitled to express his views, so long as he does not take the decision out of the hands of the jury.

But on the other points the Court has come to the conclusion that this conviction cannot stand. The Commissioner not only omitted to explain to the jury that the chief witness, Westin, was an accomplice who had pleaded guilty to the theft, but he also made observations which indicated that this witness was not only entitled to be believed, but should, and at times he even said must, be believed. Although a judge may express his view on the demeanour of a witness, when he is dealing with an accomplice he must point out that the jury should deal with his evidence with caution and weigh it carefully. There was a total absence of such a direction here, and a witness who had confessed to the theft was treated as a person who ought to be believed when there was a conflict of evidence between him and the appellant.

Secondly, in cases of receiving, it is often necessary to point out on whom is the burden of proof. Here there was a conflict where that burden lay, but no direction was given which could bring home to the jury, as it was the duty of the judge to bring home, that the burden was on the Crown to prove to the jury the guilt of the accused, and not on the accused to prove her innocence.

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GYPSY BRYANT.

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Further, there is this general observation to make, that the whole trial was unsatisfactory, so that, notwithstanding the facts, and the observations which could be made upon them, the Court cannot say that the jury would have convicted if a proper direction had been given. The Court cannot say with certainty what the result would have been, and as the Court is not entitled to speculate the conviction must be quashed.

Conviction quashed.

Solicitors for the Appellant—*Freke, Palmer & Co.*

Solicitors for the Respondents—*Margetts & Co.*

A. L. B. T.

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17 & 18 *Dec.*

FREDERICK GEORGE SCOTT.

A slight misstatement of the evidence in a summing up may not be ground for quashing a conviction.

Proviso to s. 4 *of the Criminal Appeal Act applied.*

Appeal against conviction.

The appellant was convicted on November 10th, 1917, before Mr. Justice Salter, at the Newcastle Assizes, of conspiracy corruptly to obtain bribes from persons desiring to enlist as a condition of their being admitted into a particular regiment, and was sentenced to eighteen months' imprisonment in the second division and was ordered to pay £200 towards the cost of the prosecution.

Tindal Atkinson, K.C. (with him *Lowenthal*), for the appellant (who was not present). The appellant was charged, with two other men named Moralee and Cohen, with conspiracy. He was a colonel in the Army, and was commanding officer of the Royal Marine Submarine Miners. Moralee was a captain in the same corps, and Cohen a private. In his capacity of commanding officer, the appellant had power to approve or to reject recruits. The conspiracy alleged was that the three men conspired to obtain money from persons desirous of joining the unit as consideration

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for their acceptance. Cohen himself, it was alleged, had paid money to Moralee to be allowed to join the corps. It is submitted that the conviction of the appellant should be quashed as evidence which was inadmissible was admitted, and as the judge, in summing up to the jury, misquoted the evidence to the prejudice of the appellant. The grounds of the argument sufficiently appear from the judgment.

The *Solicitor-General* (with him *Waugh, K.C.*, and *Tebbs*), for the Crown. There is no ground for impeaching the summing up. Even if there was a slight misdirection, there has been no substantial miscarriage of justice, and the Court will therefore dismiss the appeal. See proviso to s. 4 of the Criminal Appeal Act, 1907.

Tindal Atkinson, K.C., replied.

The LORD CHIEF JUSTICE: In effect, the charge against the appellant was that there had been an arranged course of dealing between him, Capt. Moralee and Cohen to secure for reward the admission of men into the unit of which he (the appellant) was commanding officer, and also to procure their retention at their local stations instead of their being sent away for service. It cannot be disputed that that is a criminal conspiracy according to our law. There is no doubt, on the facts proved, that monetary payments were made for that purpose, and the question which we have to determine is whether the case was properly proved against Colonel Scott. His appeal is based in the main on one passage in the evidence, and the reference to it in the judge's summing up. The judge said to the jury: "Cohen, as you know, says that it was arranged between Moralee and himself that he should pay to get into this unit, and he paid £150, which Moralee described in the negotiations with Cohen as £100 to Scott and £50 to myself." Criticism is levelled at these last words, and it is said that nowhere is there evidence of these words being spoken by Moralee. The evidence on which those remarks of the judge were based was that to effect Cohen's enlistment would "cost £100, and that he (Moralee) wanted £50 for himself." Mr. Tindal Atkinson contended that a misstatement of the evidence in a summing up is sufficient in

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itself to vitiate a conviction, provided that it is not a matter which may be totally disregarded. We are not prepared to agree with that view, more especially having regard to the proviso to s. 4 of the Criminal Appeal Act, 1907. In our view, this quotation by the judge, although not borne out textually by the evidence, is not sufficiently important to vitiate this conviction. In any case, if it were necessary, we should have no hesitation in relying on the proviso to s. 4 of the Criminal Appeal Act, which provides that the mere fact that there has been an irregularity or an error in a trial is not sufficient to entitle an appellant to an acquittal if this Court comes to the conclusion that there has been no substantial miscarriage of justice.

The admission of the evidence in question was also objected to. In our opinion, however, the evidence of this conversation between Moralee and Cohen was evidence against Scott, although the latter was not present when it took place, since there were *primâ facie* grounds for believing in the conspiracy between the three persons, and because the evidence was evidence of the act of co-conspirators in the course of the scheme.

Appeal dismissed.

G. B.

Solicitors for the Appellant—*Thomas & Malkin*, Stockton-on-Tees.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE SANKEY

CEDRIC SEBASTIAN STEANE.

1918
21 *January.*

The Court will not interfere with a sentence, mitigation of which would more properly be effected by the Royal prerogative.

This was an appeal against sentence by leave of McCardie J. Appellant was convicted at the Central Criminal Court on the 11th December, 1917, before the Recorder, of obtaining goods by false pretences, and was sentenced to six months' imprisonment in the second division.

Keeves for the appellant, who was present. The appellant was convicted of obtaining two rings by false pretences. The Recorder in passing sentence was under the impression that the military authorities had no further use for his services, but I am instructed that this was a misapprehension on his part, and that they are quite willing that he should serve in the ranks.

The Crown was not represented.

DARLING J.: The appellant since his conviction has been gazetted out of the Army. We can only interfere with a sentence if we think it was an improper sentence which ought not to have been passed. This was obviously a proper sentence. But we understand that the War Office are willing that the appellant should have a chance of redeeming his character by serving in the ranks. We cannot set aside a sentence because the War Office wants the appellant in the army; but the King, acting through the Home

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21 *January.*

CEDRIC SEBASTIAN STEANE.

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Secretary, can do so. Therefore, while dismissing the appeal, we say that we hope that the Home Secretary will give the appellant an opportunity of retrieving his character by serving in the ranks.

Appeal dismissed.

Solicitors for Appellant—*Percy Robinson & Co.*

A. L. B. T.

THOMAS EDWARD WAKEFIELD.

It is a mis-trial if a person not qualified as a juror sits on a jury, and a venire de novo *will be awarded.*

This was an appeal against conviction on a point of law. Appellant was convicted on the 13th December, 1917, at the Central Criminal Court, before Avory J., of rape, and was sentenced to three years' penal servitude.

St. John McDonald instructed "in person," appellant being present. In this case one of the jurymen summoned, named Tooley, sent his farm bailiff, a man named Clarke, to take his place. Clarke answered to Tooley's name, and sat on the jury which convicted the appellant. After the trial this was discovered, and Tooley was fined by the judge. The papers were sent by him to the Director of Public Prosecutions, who is waiting for the decision in this case before deciding what steps, if any, shall be taken with regard to Clarke. I understand that Clarke was not on the jury list, and was not a qualified juryman within the provisions of the County Juries Act, 1825 (6 Geo. 4, c. 50), s. 1, which requires a juryman in London to have an income assessed at £30, or to possess a freehold of the annual value of £10. In *Tremearne*, 5 B. & C. 254; 4 L. J. (O. S.) K. B. 157; 7 D. & R. 684; 29 R. R. 234, 1826, a new trial was granted in very similar circumstances, but the law appears to have been altered by 7 Geo. 4, c. 64, s. 21, which provides that "No judgment after verdict upon any indictment or information for any

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felony or misdemeanour shall be stayed or reversed . . . because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer." In *Dovey* v. *Hobson,* 6 Taunt. 460; 2 Marsh. 154, 1816, a case at *nisi prius,* where a similar irregularity was discovered before verdict the Court awarded a *venire de novo.* In *Mellor,* 27 L. J. M. C. 121; Dears. & B. 468; 4 Jur. (N. S.) 214; 7 Cox C. C. 454, 1858, a juryman who was on the panel answered by mistake when the name of another juryman was called. The appeal was dismissed by a majority of Court of Crown Cases Reserved on the ground that the Court had no jurisdiction over the case, but eight of the fourteen judges held that there had been a mis-trial. In that case the juryman who sat was qualified. S. 20 (4) of the Criminal Appeal Act, 1907, transfers to this Court all the jurisdiction and authority conferred by the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials, which was transferred to the judges of the High Court by s. 47 of the Supreme Court of Judicature Act, 1873, and in *Dickman,* 74 J. P. 449; 26 T. L. R. 640; 5 Cr. App. R. 135, 1910, Lord Alverstone C. J. said that the Court had power to grant a *venire de novo,* and it did so in *Baker,* 28 T. L. R. 363; 7 Cr. App. R. 217, 1912; and *Ingleson,* 1915, 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 11 Cr. App. R. 21. I ask the Court to say that there has been such a mistrial in the present case as will justify it in following that course.

Bryan, for the Crown. Enquiries have been made on behalf of the Director of Public Prosecutions, which go to shew that Clarke was not qualified to act as a juryman.

[DARLING J.: If Tooley and Clarke agreed that Clarke should represent Tooley they could be prosecuted for conspiracy to commit an offence. See *R.* v. *Levy, Ex parte Hobbs,* W. N. 22nd January, 1916.]

Tooley denied that he had done anything but ask Clarke to attend and explain that he was over age. The Director of Public Prosecutions has been advised that Clarke could be prosecuted for a common law misdemeanour. I can find no reported case

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THOMAS EDWARD WAKEFIELD,

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where the person who personated the juryman was himself not qualified. If the Court thinks that a *venire de novo* ought to issue I am instructed not to oppose it.

C. a. v.

A. L. B. T.

25 *January.*

DARLING J. read the following judgment:—

The appellant was, on the 13th December, 1917, tried at the Central Criminal Court, before Avory J., and convicted of rape. He was sentenced to three years' penal servitude.

Subsequently it was discovered, and brought to the notice of the court, that a man named Tooley had been summoned to serve on the jury. Tooley did not answer to his name, but a man named Clarke did, and served on the jury to the end. Clarke was not qualified to sit on the jury at all.

The real question to be determined here is whether this amounted to a mis-trial.

We think it did.

A defendant is entitled to be tried before a duly authorised judge and twelve men qualified to be jurors to try him. Many cases have decided that mere irregularity in calling together the jury—mere misnomer of a juryman—is not sufficient to avoid the proceedings. But this case is not of that character, for it is admitted by the Crown that Clarke, who presented himself when Tooley, a qualified juror, was called, and who served in his place, was not upon the panel, and was not qualified to serve as a juror. Our judgment is limited to this case where all these circumstances apply.

But here Tooley, a man duly summoned and also qualified to serve, was personated by a man who was in neither case; and so the accused was deprived of his legal right of peremptory challenge, and of trial by twelve qualified jurors.

In the case of *Reg.* v. *Mellor*, 1 Dears. & B. 468, are collected practically all the authorities bearing upon this question.

In this case, as Lord Campbell, C. J., said of that one, "there never were more than eleven jurymen whom the law could recognise." His Lordship adds, "Upon principle, therefore, there seems to me to have been a mis-trial as much as if all twelve jurors

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who served had been different persons and had different names from the jurors called by the Clerk of Assizes, in which case the prisoner would have been entirely deprived of his right of challenge."

In *Mellor's* case the majority of the judges composing the Court would appear to have been of opinion that *venire de novo* should have been granted, but to have held that the Court of Crown Cases Reserved had not statutory power to award it.

And it does not appear to us that the judges who affirmed the conviction in *Mellor's* case would not in this one have ordered the case to be tried again had they possessed the powers of this Court of Criminal Appeal.

That we have such power has been more than once affirmed in this court: see *R.* v. *William Baker,* 7 Crim. App. Cas. 217; *R.* v. *Golathan,* 11 Crim. App. Cas. 80; and this power has been exercised.

Application was made to us to allow the accused to call evidence not available at the trial, and which might put a different complexion on this case.

It is not necessary for us to deal with this application now, as that evidence can be called at the trial which will be the consequence of this judgment.

The conduct of Clarke and Tooley may well form the subject of investigation by the Director of Criminal Prosecutions, for personation of a duly summoned juryman may lead to the doing of great harm, and may amount to an attempt to pervert the course of justice and to be punishable as a misdemeanour at common law.

Venire de novo *awarded.*

IN THE HOUSE OF LORDS.

1917
3 & 4 Dec.

ARTHUR THOMPSON ..... *Appellant*

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty the King) ..... *Respondent.*

Coram: The Lord Chancellor, Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

The possession of indecent photographs tends to show in the possessor abnormal propensities such as are implied in a charge of gross indecency with a male person. Therefore evidence thereof is admissible at the trial to corroborate evidence of identity when that is in issue: per the Lord Chancellor; *"in the special circumstances of this case,"* per Lord Atkinson, Lord Parker of Waddington, Lord Sumner, Lord Parmoor; *because such possession is only compatible with a criminal purpose:* per Lord Atkinson.

Held also by Lord Atkinson: *Any document found either on the person of or in possession of an accused person bearing directly on the charge against him, is admissible in evidence. The state of the accused's mind or feelings at or before the time of the act charged is sometimes admissible in evidence of his having done that act. Such evidence is within the rule in* Makin's *case (below) because it rebuts an* alibi *defence.*

Held by the House unanimously that the Order appealed from be affirmed.

Appeal from the judgment of the Court of Criminal Appeal (*a*).

A. M. Langdon, K.C. (with him *Huntly Jenkins* and *E. J. Purchase*), for the appellant. This is an appeal on the ground of misreception of evidence and misdirection by the judge to the jury. The appellant was convicted under the Criminal Law

(*a*) 12 Cr. App. R. 261.

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ARTHUR THOMPSON.

Amendment Act, 1885, s. 11, of committing acts of gross indecency with two boys on March 16th, 1917. Evidence was admitted at the trial that after his arrest a powder-puff was found on his person, in his pocket, and also that when the police-officer went to the residence of the appellant he found in a locked drawer a number of objectionable photographs of naked boys. There was no evidence that the appellant suggested in any way that the boys should go to his house, or that he would shew them any photographs or anything of the kind, or in fact that the boys had been in the house at all; or that the photographs were intended in any way to debauch the boys, or that they had recently been taken out of the locked drawer. There was nothing to shew that they had not been kept locked up and unseen for years in the drawer where they were found. It is submitted that the mere possession of objectionable photographs is only evidence of a vicious tendency or character in the person, and there being nothing to connect the photographs with the offence charged they are inadmissible. When the Appeal Court says that persons who commit these crimes notoriously possess these things that means that they are proof of a vicious propensity, and that is not evidence. The only defence raised was an *alibi*, that the appellant was not the man who was with the boys on the day when the offence was committed. He admitted giving them a florin by mistake for a penny on the Monday; they pestered him by following him. They said that he also gave them two shillings on the Friday. Sometimes in these cases the defence raised is that the act complained of was an accident or mistake. The appellant never set up such a defence. He denied that he had ever seen the boys on Friday, March 16th, the day when the offence was committed, or on any occasion before Monday, March 19th, the day he was arrested. The evidence of the photographs did not prove the identity of the appellant, and it was not admissible to prove that he had committed the offence charged, any more than evidence that he had committed another offence of the same kind with another boy the week before would have been admissible as evidence that he had committed the offence charged.

[LORD SUMNER: Would not the Crown be entitled to say, "We cannot assume that the boys' story will be accepted *in toto* or

rejected *in toto;* it may be suggested that nothing took place which was not susceptible of explanation, and therefore we must at a certain stage tender evidence, in the first instance, to shew that no innocent explanation is possible?" Was there anything to prevent the appellant's counsel from raising the alternative defence—the appellant was not in the boys' company, but if he was, the acts complained of admit of an innocent explanation?]

Langdon. The appellant from the very beginning at the police-court raised only one defence, viz., that he was not the man whom the boys had met on March 16th. I rely upon the case of *Director of Public Prosecutions* v. *Christie,* 1914 A. C. 545; 83 L. J. K. B. 1097; 78 J. P. 321; 24 Cox C. C. 249; 30 T. L. R. 471; 10 Cr. App. R. 141. The learned judge admitted the photographs on the ground of identity. After reading the judgment of the Court of Criminal Appeal he submitted that the principles of law applicable to the case were settled, and have frequently been discussed and approved, notably in *Makin* v. *Attorney-General for New South Wales,* 1894 A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148; and by this House in *Ball,* 1911 A. C. p. 47; 80 L. J. K. B. 691; 103 L. T 738; 75 J. P. 180; 22 Cox C. C. 366; 6 Cr. App. R. 31. The general rule is that the evidence tendered must be relevant to the charge for which the accused is being tried. If the evidence merely proves, or tends to prove, that the accused is of such evil character that he is likely to have committed the offence, it is irrelevant and inadmissible. If it tends to prove that he committed the crime charged against him, it is relevant and admissible, notwithstanding that incidentally it may also prove that accused is a person of criminal or immoral character *Ollis,* 1900 2 Q. B. 758, *per* Channell J., at p. 781—782; 69 L. J. Q. B. 918; 64 J. P. 518; 19 Cox C. C. 554; 83 L. T. 251: C. C. R.; and *Perkins* v. *Jeffery,* 1915 2 K. B. 707; 84 L. J. K. B. 1554; 113 L. T. 456; 79 J. P. 425; 31 T. L. R. 444.

In reply to the illustration of Lord Sumner, on a trial for burglary, where the only defence was an *alibi,* if a man were charged with a burglary on March 16th, and not arrested until March 19th. I submit that evidence could not be

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given that a jemmy was found on March 19th on his premises in a locked drawer unless some evidence was given that the burglary had been effected by using a jemmy. If his jemmy did not correspond to the marks, it would not be let in.

[LORD SUMNER: Even without that special *nexus* judges do let in possession of implements.]

[LORD DUNEDIN: The photographs are rather analogous to the jemmy, necessarily guilty, than to a knife, for instance, which may be innocent.]

The case of a man charged with passing base coin is different —the fact that dies were found in his house capable of making the coins would be admissible in order to prove intent which is an essential element of the crime; merely passing base coin is not a crime. There was no evidence that the photographs produced were the kind of photographs usually used by persons who commit these crimes of indecency. Without some witness proving this, the evidence of the photographs was inadmissible.

The Lord Chief Justice held that the photographs were admissible on the issue of the identity of the person charged, but it is submitted that they do not prove the identity. It is conceded that evidence could not be given on this charge that the appellant had committed similar offences with other persons, but could it not be said that the identity of the appellant would be proved at least as much by such evidence as by the possession of indecent photographs? If the appellant had in his possession an illustrated copy of Boccaccio, or an unexpurgated edition of the Arabian Nights translated by Sir Richard Burton, would evidence of these facts be admissible on the issue of identity? The Court admitted that the evidence of the photographs must have influenced the jury.

The other cases relied on were the same as in the Court below, viz., *Rodley*, 1913 3 K. B. 468, and in particular the judgment at p. 474; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 645; 23 Cox C. C. 574; 29 T. L. R. 750; 58 S. J. 51; 9 Cr. App. R. 69; *Oddy*, 2 Den. C. C. 264, 1851; and also *Dal Singh* v. *King Emperor*, L. R. 44 Ind. App. 137; 86 L. J. P. C. 140; 116 L. T. 621; 61 S. J. 351; 33 T. L. R. 249, 1917;

Harris, 4 F. & F. 342, 1864; *Dossett*, 2 C. & K. 306, 1846; *Dunn*, 1 Moo. C. C. 146, 1826; *Davis*, 6 C. & P. 177, 1833; *Fisher*, 1910 1 K. B. at p. 152; 79 L. J. K. B. 187; 102 L. J. 111; 74 J. P. 104; 26 T. L. R. 122; 3 Cr. App. R. 176; *Cole*, Phillips on Evidence (10th ed.), 508, 1810; *Rhodes*, 1899 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; 19 Cox C. C. 182; C. C. R.; *MacKenzie* and *Higginson*, 75 J. P. 159; 27 T. L. R. 152; 6 Cr. App. R. 64, 1910.

[LORD PARMOOR: On a trial for rape would prisoner's possession of indecent photographs of women be evidence?]

Langdon: I submit not.

[LORD PARMOOR: You have to consider the conditions of the case. The real question is whether the photographs are relevant evidence.

LORD DUNEDIN: But here the act can only be criminal; that is not so in rape.

LORD PARKER OF WADDINGTON: Is there any evidence here that these are photographs which people of this description usually use in perpetrating their crimes?]

Langdon: None; that is part of my case.

[LORD PARMOOR: You mean that it is like attempting to prove that a man was burglariously minded because he had committed a lot of burglaries?]

Yes.

[LORD PARMOOR: It would be quite different if one of the photographs had been of one of the boys?]

Yes; there would have been a *nexus*.

The *Solicitor-General* (with him *Travers Humphreys* and *Branson*), for the Crown, submitted that evidence which tends

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merely to prove that the accused is a person likely to commit the offence is inadmissible, but if the evidence tends to shew that he did in fact commit the offence charged, it is none the less admissible though it also tends to shew that he has committed other offences, or is a person of criminal disposition—*Makin's* case, above. It was odd, as the learned judge said in his summing up, if these boys were mistaken in having made this charge that a person should appear at the place for which they said the appointment was made, and that he should be a person who had powder-puffs in his pocket and indecent photographs in his drawer. Proving such possession was very different from proving a previous conviction. The appellant had put in issue his identity with the man who had committed the offence with the boys on March 16th. Was not the fact that the man whom the boys met on March 19th, and who they say was the man they met on the 16th, was carrying a powder-puff in his pocket, corroborative evidence of the boys' statement and evidence tending to prove the identity of the appellant? It tended to limit the class from which the appellant was drawn.

The appellant's counsel here and below had been compelled to admit that there was no valid legal objection to the evidence of the finding of the powder-puff in appellant's pocket, but what useful distinction could be drawn between tendering this evidence and that of the photographs which at the same time were found in his house? In both cases the evidence might be said to suggest that he was a man of criminal disposition with propensities to commit this crime. It must be remembered, too, that all the photographs were photographs of naked boys with the exception of one, which represented a nude woman. These implements and accompaniments of abnormal crime helped to identify the appellant with the culprit of the earlier day.

[LORD SUMNER: If the appellant on Saturday, March 17th, had committed similar crimes with other boys, could you have given evidence of that on this charge?]

The *Solicitor-General.* I know of no ground in principle why that evidence should not be offered. It may be said that it is proof of another crime: True. But in the circumstances of this case such evidence was relevant. He

then referred to cases of "long-firm frauds," and also to *G. J. Smith*, 84 L. J. K. B. 2153; 31 T. L. R. 617; 11 Cr. App. R. 230, 1915. Where there was *primâ facie* evidence that a defendant was guilty of the act charged, evidence of similar acts was admissible to shew that those acts were done with intent, and there was no difference in principle between the admission of such evidence to negative an allegation of accident in such a case and the admission of such evidence to corroborate evidence of identity where the answer was, "This is a mistake; I am not the man."

[LORD PARMOOR: Is evidence not otherwise admissible admissible in corroboration?]

No; but it may be relevant on the whole facts.

[LORD PARMOOR: But each of those facts must be relevant?]

Yes.

[LORD DUNEDIN: You rely on the photographs being of boys?]

Yes. *Ball* (above) was to the point here. The possibility of the defence of *alibi* let in evidence of rebuttal. Here the defence was set up at the police-court.

[LORD PARMOOR: If there had only been one meeting, I certainly should not consider that enough *nexus* to let in the photographs.

LORD DUNEDIN: You say the second meeting makes no difference in relevance, but a great difference in weight?]

Yes. If a burglar were seen outside a house about the time it was broken into, and a bag containing burglar's tools were found in his bedroom upon his arrest a few hours later, I submit that could be given in evidence; the weight in particular cases might be slight.

[LORD PARKER: Surely the possession of such tools does not shew the owner is a burglar?]

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Not conclusively, but it might be some evidence, and might be supplemented. Previous convictions differed (and could not be proved), because they were past; here possession was contemporaneous.

[LORD PARKER OF WADDINGTON: It seems to me an extraordinarily dangerous thing to say that you may rove over everything in a man's possession to see whether he has anything that points to his character as being that of a man likely to commit a crime That is what the Privy Council [in *Makin*] wanted to avoid.

LORD DUNEDIN: The gist of the appeal is appellant's identity. If the Court of Appeal is right in saying that the photographs are evidence of the identity, because a man who had them would be "likely to have such photographs," they are right; if not, they are wrong.

LORD PARKER: In other words, propensity becomes an identification mark. If the man you are trying to identify with the man of Friday has the propensity shewn by the photographs you get a logical and proper *nexus*.]

Yes.

[LORD PARKER: But then it all depends on the evidence that the man of Friday had this propensity, of which the only evidence I can see is that he committed the crime and made an appointment for another.

The LORD CHANCELLOR: Surely that is strong evidence of propensity?

LORD PARMOOR: That excludes the case of one meeting only.

The LORD CHANCELLOR: Intent on that day strongly corroborates and throws great light on the question whether the boys were telling the truth about the 16th.]

Yes.

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[LORD PARKER: There is very much less difficulty about the powder-puff than there is about the photographs.]

The *nexus* is much closer.

[LORD SUMNER: It would be different if he had the photographs in his pocket, and had shewn them to the boys or offered to do so at his house.]

The Lord Chief Justice deals expressly with the question of *nexus*.

The *Solicitor-General* then dealt *seriatim* with the cases cited by appellant's counsel. The discretion given to the Court below by the proviso to s. 4 of the Criminal Appeal Act was equally to be exercised by this House, *i.e.*, if no "substantial miscarriage of justice has actually occurred." But this was not a case for the proviso. The evidence, in his submission, had been rightly admitted for the reasons given by the learned judge at the trial and approved by the Court of Criminal Appeal.

Langdon, K.C., in reply, admitted the relevance of the powder-puff if intent on the 19th is relevant. The introduction of the photographs prejudiced the trial.

[LORD PARMOOR: On a trial for murder could you shew that defendant was an angry kind of man likely to commit murder?]

No, but you could shew motive against a particular person, the deceased—there *quo animo* would be an issue. Intent on the 19th can have nothing to do with identity on the 16th.

If evidence is not admissible by its own strength, it cannot be relevant as corroboration.

[LORD PARKER: The boys' story is consistent with his going on the 19th to say that he regretted the misconduct on the 16th, and they must behave better for the future.]

Langdon then cited *Baskerville*, 1916 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 606; 12 Cr. App. R. 81, on corroboration, as reviewing all the cases.

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"Propensity" means no more than the character or bias of a man—a phase, an element of character. To let in propensity is to let in character, and that is what *Makin* says you may not do—let in general character.

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The LORD CHANCELLOR (*a*): My Lords, this is an appeal with the sanction of the Attorney-General, from a decision of the Court of Criminal Appeal affirming the ruling of Mr. Justice Lawrence that certain evidence was admissible.

The facts are sufficiently stated in the following paragraphs from the judgment of the Lord Chief Justice: "The appellant was convicted of committing acts of gross indecency with two boys, and also of assaulting a police constable. He appeals against the conviction on the grounds that (a) the judge wrongly admitted evidence which was not relevant to any of the offences charged in the indictment, and (b) the judge misdirected the jury by telling them that they might take this evidence into consideration. If the evidence was admissible no complaint can be made of the direction to the jury, therefore the sole question in this appeal is whether this evidence was or was not admissible. It was not disputed at the trial or on this appeal that the offences had been committed with the boys. The defence was that the appellant was not the person who committed them, and that he was elsewhere on the day and at the time in question. For the prosecution there was a body of evidence identifying the appellant. One boy had seen him and spoken to him about a month before; both boys identified him as the man who on the 16th March did the acts complained of, and gave them money and told them to meet him again on the Monday, the 19th March. Both boys went on the Monday to the appointed place and saw the appellant, who was accompanied by two other persons. He told the boys he had business that day and had no time; they were to go away, and that the tall man was a policeman. He gave one boy two shillings to divide with the other. The police, who had been informed of the events of the 16th March and were present to watch on the 19th March, then intervened. The boys thereupon told their

(*a*) The judgments are printed from a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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story in the presence of the appellant, who made no reply, but struck the police officer and endeavoured to run away. At the trial the appellant and other witnesses gave evidence on his behalf to establish an *alibi* on the 16th March. It was not in dispute that he saw and spoke to the boys on the 19th March. His story was that on this day he saw the boys following him, that he went into a shop and saw them again as he left it, and that he then told them to go away, gave them a coin out of his pocket without looking at it, and told them to buy soap and get their faces washed. At the police court he said he was not guilty and had never set eyes on the boys before his arrest. During the course of the trial evidence was tendered by the prosecution to prove that when the appellant was arrested on the 19th March two powder-puffs were found upon him, and that in a drawer in one of the rooms where he lived photographs of boys were found, including twelve separate photographs and ten pasted in an album of naked boys in various attitudes. Objection was raised to the admissibility of this evidence on the ground that none of these articles was connected with any charge on the indictment, and that the evidence could only serve to prove that the appellant was a person of evil character or disposition with regard to boys, and therefore was a person likely to commit the offence. After argument the learned judge admitted the evidence as tending to corroborate the evidence of identification of the appellant. The appellant by his evidence sought to explain that these photographs had come into his possession for the purpose of artistic study, that he had spent nine months in Italy studying sculpture, and had acquired most of the photographs there. Having regard to the verdict of the jury and the examination by the Court of the photographs, we must take it that these photographs are not of an innocent, but are of an objectionable character."

The Court of Criminal Appeal dismissed the appeal, and I think they were right. The charge on which the appellant was tried was in respect of the offence proved to have been committed on the 16th March. The defence of the appellant was that these acts must have been committed by some other man, as he was at another place altogether at the time when the acts were committed on the 16th. The whole question is about the identity of the person who came to the spot on the 19th with the person who committed the acts on the 16th. What was done on the 16th shews that the person who did it was a person with abnormal propensities

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of this kind. The possession of the articles tends to shew that the person who came on the 19th—the appellant—had abnormal propensities of the same kind. The criminal of the 16th and the appellant had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to shew the probability of the truth of the boys' story of identity.

In my opinion Mr. Justice Lawrence was right in admitting the evidence, and this appeal should be dismissed.

LORD DUNEDIN: My Lords, the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shewn to be best fitted to elicit the truth about guilt without causing undue prejudice to the prisoner. That being so, I should hesitate long before I ventured to interfere with an unanimous judgment of a Court of learned judges who are daily engaged in the practice of the criminal law; but, apart from this, to me, weighty consideration, I entirely agree with the reasoning contained in the judgment of the learned Lord Chief Justice, and I accordingly concur.

LORD ATKINSON: My Lords, in argument in this case it has occasionally been forgotten, I think, that the point for decision is the admissibility of these photographs in evidence on the issues raised for the decision of the jury, and not their weight as evidence. If a document be found either on the person of or in the room occupied by an accused person bearing directly on the crime charged against him, but undated, and there be no evidence to shew when it came into his possession or when it was written or printed, it might be urged, as it was urged in this case, that it might have come into his possession when he was young and foolish, and that even if his character was then ever so depraved or reckless, or criminal, as the possession of the documents might indicate, he may have long since repented and reformed, and become of blameless life and character. All that may be perfectly true, but that possibility goes, I think, to the weight of the evidence, not to its admissibility. Again, it seemed, sometimes, as if it was almost contended in argument, that the state of a person's mind or feelings at or before the time when the crime of which he stands charged is committed, can never be given in evidence against him to shew not merely *quo animo* he did the

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act charged, but that in fact he did that act. In a case of homicide, for instance, evidence is admissible to prove that the accused entertained feelings of hatred towards, or a desire to be revenged upon the deceased, in order to prove that he killed the deceased, not merely *quo animo* he did so; and again in cases of robbery or embezzlement, the need of money or the greed for money may be proved in evidence to shew that the accused who had that need, or entertained those feelings of greed, committed the crime. These things are not the less states of mind and feeling because they are described as motives for the commission of the crime.

It is not disputed that the general principles upon which evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is admissible are correctly laid down in the judgment of Lord Herschell in *Makin* v. *The Attorney-General for New South Wales*, 1894, A. C. 57. This evidence may be given if it be relevant to an issue raised before the jury, and it may be relevant if it bears upon questions whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. Lord Herschell added: "The statement of these general principles is easy; but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other." Several cases have been cited in argument which are little more than instances in which the difficult task alluded to by Lord Herschell has been accomplished or has been failed in and the evidence tendered has been placed upon one side or other of the line by the different courts before which the cases came. I think, however, the Solicitor-General was quite justified in contending that the admissibility in evidence of those indecent photographs of naked boys of different ages must be determined when they are taken in connection with all the facts and circumstances proved in the case. The two boys proved not only that the accused had upon the 16th March in the urinal near the Turnham Green Railway Station committed the offence charged, and given them one shilling each, presumably as a reward for what they had done to him, or permitted him to do to them; but when leaving them after the commission of the crime asked them to meet him at the same place, Turnham Green Railway Station, at the same time on the following Monday, the 19th, "to

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do it again"; that they accordingly went to the same place, about the same time, on the following Monday, and found the appellant there talking to two men, that he made a sign to them with his head, that they followed him, waited for him when he went into a shop, that after he had parted from his friends, they followed him again, when he told them to go away, and said he had not time that day (a most significant expression), that he had some business to do; that he then gave them a two-shilling piece, the same amount as before, and again said "Go away"; adding "that tall man," pointing to Sergeant Blackmore, "is a policeman" (another most significant expression). These two significant expressions tend to shew that he met those boys with an intention to do something with which the police might interfere. If what he had not time to do was innocent, why should the presence of the police be feared? That the appellant gave the two boys a two-shilling piece is admitted by him; it could not well be denied as the gift took place almost in the presence of the detective-policeman Sergeant Weston, who when examined proved that on the 19th he saw the accused in company with two gentlemen near the level crossing of the railway near Turnham Green Railway Station, that he saw the boys following these gentlemen, and saw the accused turn round and make a motion of his head at the boys, that subsequently the appellant parted from his two friends, then crossed the road to where the two boys were standing, entered into conversation with them for a few moments, that he then saw him (the appellant) take something from his pocket and hand it to the boys, that he then rushed up and said to the appellant, "I am a police officer, what are you doing to these boys?" To which the appellant replied, "I have not spoken to any boys."

The boy Jones in the presence of the appellant and Sergeant Weston, made the following statement, to which the appellant made no reply whatever: "He (the appellant) gave us two shillings. He said, 'It's no use to-day, that tall man' (pointing to Sergeant Blackmore) 'is a policeman. He had arranged to meet us at three o'clock. He took us to the urinal near the Bath Road on Friday last," that on the way to the station-house the appellant said, "I did give the boys two shillings; I can give money to whom I like." At the police-station Weston stated he told the appellant he would be charged with attempting to procure these two boys to commit an act of gross indecency, and also with actually

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committing such an act on the 16th March with male persons in a public urinal, and further with assaulting Weston himself; that when the charges were being read over to him he said, "As to the first two charges I do not say anything. I do not think I struck you. I did not mean to hurt you."

During the progress of the case it was suggested in cross-examination, as it was afterwards deposed by the appellant, that he was not in the Turnham Green urinal on the 16th of March, and that anything which took place between him and these boys on the 19th was, as far as he was concerned, quite innocent. These were his defences.

Now, even on the evidence of the police alone, the appellant was brought into strange—and, having regard to the giving of two shillings, and his silence when Jones told his story in his presence—into most suspicious relations with these boys on this 19th of March. The transactions of that day are so connected with those of the 16th of March that if his intent on the 19th was to commit, or endeavour to induce the boys to commit on that day any act of indecency with them, it would, in my view, be strong evidence to prove that he was the very man who committed the offences charged on the 16th, and that the boys were not making any mistake whatever in their identification of him. It would, indeed, be strange if one man should commit the offence charged on the 16th, making an assignation with them to commit it again upon the 19th, that another man should, with an intent to do the same, take up and fulfil the first man's engagement as it were, personate him, and keep the appointment the first had made. It would appear to me that evidence which goes to prove that the appellant had in his transactions with these boys on the 19th an intent or desire to commit an indecent offence with them, if circumstances should permit, becomes evidence to identify him as the person who actually committed on the 16th the offence for which he was indicted. Apparently the appellant himself fully appreciated this, for while he stated that the boys did follow him, stared into his face, waited for him while he was in the shop, and watched him through the window—yet he gave them two shillings and told them to go away as the tall man, pointing to a man, was a police-man. The tall man he pointed to was, he said, not Sergeant Blackmore, but one of his own friends, and that he then told them they should wash their dirty faces. The contest then narrows itself

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down to this: were the sets of acts deposed to in the main by each side as having taken place on the 19th done with the wicked intent the prosecution alleges, or with the innocent intent the appellant, in his defence, alleged? When he is searched powder-puffs are found on his person. It is stated that powder-puffs are some of the things with which persons who commit abominable and indecent crimes with males arm themselves for the purpose of carrying out their criminal designs. For what purpose could the appellant carry upon him on this day the powder-puffs? He could not by them promote the cause of charity or cleanliness. He could not have carried them for such a purpose; the time had not arrived for their use; but can it be reasonably doubted that they were carried to be used when needed? The possession of them is, in my opinion, admissible in evidence to shew, when taken in connection with the facts proved that the appellant harboured on that day an intent to commit an act of indecency with these boys should occasion offer. Well, if these photographs of naked boys, some when apparently approaching adolescence, all I think indecent in their attitude, and some apparently depraved in their suggestion, had been found on the person of the accused, I do not see how any distinction could well have been drawn between them and the powder-puffs. They, too, are, it is stated, implements for carrying out the same design. I do not know, and it is not stated whether they are used to stimulate the depraved lusts of those given to such practices, or to corrupt the mind of those whose assistance or sufferance such people seek; but this I think is clear, that they could not be needed for the work of a hygienic enthusiast so devoted to youthful cleanliness that he gave to two boys he had never met before, and who had teased him by staring at him, two shillings to get their dirty faces washed. The fact that they were found in the appellant's drawer and not on his person may make them less cogent evidence of a criminal intent towards these boys than if they had been found upon his person; but still, in my view, the possession of them is some evidence of the existence of a criminal intent towards these boys on the 19th of March, and, if so, some evidence of the identity of the person harbouring that intent with the person who had committed the crime charged upon the 16th March. I think they belong to the class of evidence mentioned by Lord Herschell in *Makin's* case, namely, evidence designed and intended to rebut a defence which would be other-

wise open to the accused—in this case an *alibi* for the 16th of March. In my opinion, therefore, the appeal fails and should be dismissed.

LORD PARKER OF WADDINGTON, whose judgment was read by LORD ATKINSON: My Lords, I also have come to the conclusion, though with some hesitation, that the evidence in question was admissible. I think, however, that it was admissible on one ground only. The real issue was the identity of the accused with the man who committed the crime of the 16th of March. If the abnormal propensity of the criminal of the 16th March, manifested by the nature of the crime and the appointment for its repetition can be regarded as one of the *indicia* by which his identity can be established, the evidence is admissible as shewing that the accused had the same abnormal propensity. For the reasons about to be explained by my noble and learned friend Lord Sumner, I have come to the conclusion that it may be so regarded. But it would, in my opinion, be wrong to treat your Lordships' decision in the present case as laying down any principle capable of general application.

LORD SUMNER, whose judgment was read by LORD DUNEDIN: My Lords, the question of this appeal is whether either the powder-puffs or the photographs, or both, were admissible in evidence to prove the identity of the appellant with the person who committed the offences against the Criminal Law Amendment Act, 1885, s. 11, on 16th March, 1917. The facts most material to be borne in mind are as follows:—(1) If Maunders and Jones told the truth at all, they proved the crime up to the hilt. There was no question open of intent or *mens rea*. There was no possible appearance of innocence which might need to be rebutted. The nature and quality of the acts were unequivocal. (2) Neither the objects in question, nor any similar objects were used, produced or mentioned on 16th March, nor were they or any such objects shewn to have been on the person of the man who committed the crime on that day. (3) Of these objects the judgment under appeal observes: "It is well known to those who have experience of these cases, that persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as powder

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and powder-puffs, and implements such as objectionable pictures for the purpose of carrying out their designs." I accept this without discussion. (4) There were found shortly afterwards by the police in a locked drawer in the appellant's room a few ordinary portrait photographs, and along with them about a score of others, of which it was admitted that they shewed the appellant to be a person of depraved mind. All were photographs of boys. (5) After committing the offences on March 16th, the criminal made an appointment with the boys for March 19th at the time and place where he had first met them on March 16th. When they kept that appointment the appellant was there or thereabouts. He had the powder-puffs with him.

No one doubts that it does not tend to prove a man guilty of a particular crime to shew that he is the kind of man who would commit a crime, or that he is generally disposed to crime, and even to a particular crime; but sometimes for one reason, sometimes for another, evidence is admissible notwithstanding that its general character is to shew that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent or system, or in rebutting an appearance of innocence, which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of fraud, such evidence is constantly and properly admitted. Before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man, whose act is so nakedly wicked as to admit of no doubt about its character, may be better off in regard to admissibility of evidence than a man whose acts are, at any rate, capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences, by prudently confining himself to one. Still, so it is. In the present case, even before the justices it became clear that the accused made one case, and one case only, and so it has been throughout. He said that he was not the man.

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It has been argued that the evidence in question went to another issue than that of identity, namely, to corroboration. I think when examined this will be found to be a fallacy. Evidence to corroborate Maunders and Jones, in view of their participation in the conduct in question, was duly given, and no point of this kind was raised, but it was said that the fact that the man whom the boys identified was a person who had in his possession these incriminating objects, tended to confirm their accuracy, and to shew that they had made no mistake. As it seems to me, this is only another way of saying that the possession itself goes to provide identity. That the boys should pick out as the guilty person someone, who, unknown to them, possessed these objects, confirms their accuracy, if such possession is one of the personal *indicia* of the guilty man, for it shews that they selected a man, who so far corresponds to the man who was wanted. If not, it only shews that, although he may not be the right man, he is probably quite as bad. Their evidence is confirmed by the possession only, if the possession is itself direct evidence of identity.

As was admitted, there was a stronger case for the admissibility of the powder-puffs than of the photographs. I think the powder-puffs were clearly admissible. The criminal made an appointment with the boys for the following Monday, and to the place of that appointment at the appointed time there came the appellant, equipped with articles recognised by the Court as "used for the carrying out of their design" by persons of the class to which the criminal belonged. They are direct evidence that the appellant was keeping the criminal's appointment and was the same man. This only makes the admissibility of the photographs more critical. No jury could fail to be influenced by the discovery of them in the accused's possession, and hence the discretion given by the proviso in s. 4 of the Criminal Appeal Act, 1907, could not be exercised in respect of them. The Court below did not purport to exercise that discretion; their decision was that the appeal should be dismissed. The question before your Lordships is whether that decision was right.

The statute which creates the Court of Criminal Appeal, and also creates your Lordships' jurisdiction in appeal from that Court, confers no original discretion on your Lordships, but on the Court of Criminal Appeal only, and it is not in my opinion open to contention, though it was suggested for the respondent, that your

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Lordships, even if you were minded to do so, could now say that you "consider that no substantial miscarriage of justice has actually occurred" from the trial of the appellant upon such evidence, if it be inadmissible.

The photographs thus become the turning point of the case. The principles on which the admissibility of evidence of identification rest are in no need of restatement. Indeed, new formulæ on so trite a topic may tend to introduce qualms or doubts. The question is always not so much what is proved as what it proves. All lawyers recognise as part of their professional premisses, that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man. Laymen are apt to think that the difference, if any, is in favour of admitting the former. There must be something to connect the circumstance tendered in evidence, not only with the accused, but with his participation in the crime. It is this something which is expressed in the judgment under appeal in the words "ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do. . . . The man who did the acts on the 16th March was a man who would be likely to have such photographs in his possession. The man arrested on the 19th, in fact, had such photographs in his possession at his rooms." Illustrations, it is true, were employed during the argument both at your Lordships' bar and in the court below, and I think in one passage in the judgment, which went considerably beyond the limits of admissibility, but as applied to the facts of the case, I think the meaning of the above passage may be restated more fully as follows: The actual criminal made an appointment to meet the same boys at the same time and place three days later, and presumably for the same purpose. This tends to shew that his act was not an isolated act, but was an incident in the habitual gratification of a particular propensity. The appellant, as his possession of the photographs tends to shew, is a person with the same propensity. Indeed, he went to the place of the appointment with some of the outfit, and he had the rest of it at home. The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name. Experience tends to shew that these offences against nature connote an inversion of normal characteristics, which, while demanding punishment as offending against social morality, also partake of the nature of

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an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker, is only a particular specimen of the *genus* rogue, and though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognisable mark of the individual. Persons, however, who commit the offences now under consideration, seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class, as much as if they carried on their bodies some physical peculiarity. So expanded and understood, I accept the passage, which I have quoted above, and think that the photographs, found as they were and after a short interval of time, tend to shew that the accused had this recognisable propensity, which it was shewn was also the propensity of the criminal of 16th March. It was accordingly admissible evidence of his identity with that criminal. Its weight was for the jury. No doubt it required considerable discretion in introducing it at all, and a careful direction from the learned judge, but it is admitted that this was given in unexceptionable terms.

My Lords, if the person who committed the offence had, either by word or conduct, established any connection between what passed on that occasion and the photographs themselves, their admissibility, found as they were so soon afterwards, would present no difficulty. If, on the other hand, there had been nothing to shew a propensity in the criminal to the practice of such acts, such as the making of the appointment, I should have thought that the photographs were merely objects going to the accused's bad character, and not to his identity with the criminal in the particular case. I certainly do not think it could be held that, as a matter of course, even in the case of crimes of this class, the articles found in a man's possession, not as parts of the transaction which is being inquired into, but at a separate time and place, could as such be put in evidence against him merely because they were such as criminals possess or use, and in the absence of any circumstance in the crime tending to shew a specific connection between it and the articles in question. If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, merely because at another place and time burglar's implements were found on his premises, it is difficult to see what

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limit could be put to the admissibility of general evidence of bad character, and the fact that evidence of articles found on the premises of accused persons is constantly given without much question, though I doubt not in the vast majority of cases quite rightly, is really only misleading, unless at the same time we ask the question what exactly does this purport to prove, and by what probative *nexus* does it seek to prove it.

My Lords, in the view I take of this case, no "point of law of exceptional public importance" arises, and I cannot help regretting that it should have been thought to be "desirable in the public interest that a further appeal should be brought." The certificate of the Attorney-General which is the condition precedent to an appeal to your Lordships' House from a decision of the Court of Criminal Appeal is granted in his discretion, and is the subject neither of review nor of criticism, but I hope that other persons in like position to the appellant will not be encouraged by this case to attempt to obtain such a certificate on similar grounds. The question here is and is only whether, in particular and peculiar circumstances, the finding of these articles could be given in evidence. It raises no new principle of law, it elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case. That such application often gives rise to difficulties we all know, but they have to be solved *ambulando*, and no discussion of them on appeal will lead to the formulation of any rule that will go beyond those in general use. I think that the evidence was admissible, and that the appellant was rightly convicted.

LORD PARMOOR, whose judgment was read by LORD SHAW OF DUNFERMLINE: My Lords, it is not necessary to restate the facts in this case. It is a recognised principle of the criminal law that, apart from special conditions or statutory enactment, evidence is not admissible merely to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged. *Makin* v. *Attorney-General for New South Wales*, 1894 A. C. 57; *Reg.* v. *Oddy*, 2 Den. C. C. 264, 1851; *Rex* v. *Cole*, 1810, Russell on Crimes, Vol. 3, p. 403, 6th ed., note (a); *R.* v. *Bond*, 1906 2 K. B. 389. It is of great importance that this principle should be maintained to ensure a fair trial in criminal cases. On the other hand, such evidence is admissible if there is any connecting

relationship between it and the particular crime with which a prisoner is charged. If such evidence is admissible, it cannot be excluded on the ground that it may incidentally introduce considerations which may tend to prejudice the trial of the person accused. It is not desirable to attempt an exhaustive definition, and it has been more than once pointed out by experienced criminal judges that the difficulty arises not in the enunciation of the general principle, but in its application to the circumstances of a particular trial. The case of *Makin* v. *Attorney-General for New South Wales*, 1894 A. C. 57, decides that evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is admissible if it bears upon the question whether the acts alleged to constitute the crime in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. It has been pointed out that before evidence is admissible to rebut a defence, such defence should, in some form, have been put forward on behalf of the accused; but no difficulty arises under this head in the present appeal. The defence set up was mistaken identity, and if the evidence objected to is relevant to this issue, it is admissible. It would not be admissible on an issue whether the crime was designed or accidental, since no such issue was involved in the trial.

It was incumbent on the prosecution to prove that the acts of indecency had been committed, and that the accused had committed them. Under the first head, there is no question; under the second the accused denied that he was the person who had committed the indecent acts, and called evidence to prove that he was elsewhere on the day and at the time in question. The question in debate is whether, in all the surrounding circumstances of the particular case, there is any connecting relationship between the evidence to which objection has been taken and the crime with which the accused was charged.

In my opinion there is a difference on the question of admissibility of evidence between the powder-puffs and the photographs. The powder-puffs were found upon the accused when arrested, immediately after his meeting with the boys on the 19th, and corroborate the evidence of the boys that the accused was the person who, after committing the offence on the 16th, had arranged to meet them for a similar purpose on the 19th. This evidence is sufficiently connected with the crime charged in the indictment,

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and is not merely evidence of criminal propensity. Mr. Langdon, however, directed his main argument not to this point, but to the production of the photographs, and it is under this head that the difficulty arises. I do not think that this difficulty is met by a reference to the analogous cases, such as burglary. It must be determined on the special circumstances of the particular case.

If there had been no appointed meeting on the 19th the evidence would, in my opinion, not have been admissible. The issue would then have been, did the evidence of the boys establish the identity of the accused? The prosecution could not then competently have produced the photographs, since there was no connecting relationship of any kind with the crime charged, however much the photographs might tend to shew a criminal propensity towards a crime similar to that charged against the accused. The point, however, arises, whether the photographs became admissible and the necessary connection established, in consequence of the meeting on the 19th. The meeting on the 19th, following the appointment made on the 16th, implies that the person accused of the indecent acts on the 16th was a person of criminal propensity to commit such an offence as was charged in the indictment. If this is so, the person who committed the offence on the 16th may be identified as a person of criminal propensity to commit such an offence as was charged in the indictment. I accept the statement that the photographs, to which objection was taken, are evidence that the person, in whose lodgings they were found, was a man of criminal propensity to commit the offence charged in the indictment. The conclusion from these premisses is that the photographs are admissible as evidence of identification, and to rebut the case set up by the accused that he was elsewhere on the day and at the time in question. My Lords, I have come to the conclusion that in the special circumstances of this case the photographs were admissible as evidence against the accused. It is not alleged that the learned trial judge in any way misdirected the jury.

My Lords, the appeal should be dismissed.

Order appealed from *affirmed;* and Appeal *dismissed:—Minutes of Proceedings,* January 24th, 1918.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE SANKEY.

MARY BROADHURST, THERESA MEANLEY, AND HERBERT BLISS HILL.

1918
14, 15, & 16 *Jan.*

The appellants were convicted on November 10th, 1917, before Avory J. at the Central Criminal Court, of uttering a forged will. Broadhurst and Meanley were each sentenced to five years' penal servitude and Bliss Hill to three years' penal servitude. Broadhurst and Meanley now applied for leave to appeal against their sentences, and Bliss Hill appealed against his conviction and sentence.

Broadhurst and Meanley were not present and were not represented by counsel; Bliss Hill appeared in person; *G. Cecil Whiteley* and *H. D. Roome* for the Crown.

On Monday, January 14th; Tuesday, January 15th; and Wednesday, January 16th, the appellant, Bliss Hill, argued in person in support of his appeal. The hearing was then adjourned.

January 28th: Bray J. said that it had been decided that the case should be heard by a full Court, and it was accordingly adjourned for that purpose.

G. B.

28 *January.*

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

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JOSEPH JONES.

In an indictment for murder there ought not to be a count for a crime of violence.

This was an application for leave to appeal against conviction. Appellant was convicted, on the 15th January, 1918, at the Central Criminal Court, before Darling J., upon an indictment charging him with murder and on another count with robbery with violence. He was sentenced to death and to ten years' penal servitude.

Bryan, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with two men, Sharp and Maguire, for the murder of Imlay, a Canadian soldier, on the 8th November, 1917; the indictment also contained two other counts charging the prisoners with robbing with violence Imlay and another Canadian soldier McKinlay. Sharp pleaded guilty to robbery with violence; the appellant was convicted of murder, and Maguire of robbery with violence. The case for the prosecution was that the prisoners enticed the two men to a lonely passage, and that the appellant produced a policeman's truncheon, with which he struck Imlay a blow, from which he died four days later; that McKinlay was also hit by Jones, and then the pockets of the two men rifled. Jones's defence was that he had no truncheon; that he had just turned away when he heard a thud, and then saw Sharp strike Imlay. He admitted that he went off with the other two and shared the proceeds of the robbery, but denied that he used any violence. One issue at the trial was whether the appellant possessed the truncheon. It was at his rooms, and Sharp was lodging there; it is suggested

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that Sharp took it. The learned judge did not put the case for the appellant on this point clearly before the jury. He told them that to convict of murder they must find that the appellant struck the fatal blow.

Travers Humphreys for the Crown, was not called upon.

A. T. LAWRENCE J.: This conviction cannot be disturbed. The murder was committed in circumstances of great brutality; the three men combined to rob Imlay and McKinlay, their fellow soldiers. There is absolutely no ground for questioning the conviction. The judge put the case in the most favourable way for Jones, and directed the jury that it was necessary to find that he struck the blow. If this was a combined robbery, this was a direction too favourable to the appellant. The jury must have found that he struck the blow which caused Imlay's death, and there was ample evidence on which they could so find. The truncheon was his property; he was seen to handle it, and to put it on the bed ready for use. After Jones and Sharp had gone out it was no longer on the bed. After they had gone out it was used, and it is only reasonable to say that it was used by Jones. Jones returned without the truncheon, but later he told Sharp and Maguire that he had got rid of the "gear." This Court thinks that these combined attacks are very serious and must be repressed. There is no ground for saying that this was not a case of wilful murder, so the appeal must be dismissed.

The sentence of ten years' penal servitude must necessarily be quashed, and the Court thinks that in cases of murder the indictment ought not to contain counts of this kind. A trial for murder is too serious and complicated to have such counts inserted, and such was not the intention of the Indictments Act, 1915. The proper course is to have a second indictment in such a case, and then if the prisoner is acquitted of murder, or is convicted and the conviction quashed, he can be tried on the second indictment.

Appeal against conviction for murder dismissed.

Sentence for robbery with violence quashed.

A. L. B. T.

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Avory J.
Shearman J.

JOHN MILLS SUMNER.

Severity of sentence for crime not accompanied by violence.

This was an appeal against sentence and an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted, on the 12th January, 1918, at the Liverpool City Sessions, of housebreaking and of being a habitual criminal; he was sentenced to ten years' penal servitude and ten years' preventive detention.

Appellant in person.

Procter for the Crown.

A. T. Lawrence J.: We are of opinion that the sentence of ten years' penal servitude was unduly heavy in all the circumstances of the case. The appellant is a young man, although distinctly a bad habitual criminal—bad in the sense that his crimes are habitual, but they are not marked with violence. They were skilfully managed as regards the disposal of the goods so that the matter should not come to the knowledge of the police. The penal servitude must be reduced to three years, leaving the preventive detention at ten years. The effect is that if he does reform and shew by his conduct that he is worthy to be released he may be set free at an early stage; but in the interests of the community the sentence of preventive detention must stand.

Sentence reduced.

Solicitor for the Respondent—*E. R. Pickmere,* Town Clerk, Liverpool.

A. L. B. T.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE LUSH AND MR. JUSTICE SALTER.

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The Court will not review a judge's comment on defendant's not giving evidence nor on his not calling a particular person.

The statement of an accused person is not necessarily in law inadmissible because he was not cautioned that it might be put in against him.

A person not under arrest but detained for enquiries, who, at the request of a police officer, writes down certain words, does so voluntarily.

Remarks by the Court on the rules laid down by the Judges in 1912 *for the guidance of police officers in interrogating suspected persons* (1) *not in custody,* (2) *in custody.*

This was an appeal against conviction on matters of law. The appellant was convicted on the 18th January, 1918, at the Central Criminal Court, before Darling J., of murder, and was sentenced to death.

L. Morgan May for appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was tried with a Madame Roche for the murder of Madame Gérard, with whom he had been on intimate terms. At the close of the case for the prosecution the case against Madame Roche was withdrawn, and she is now awaiting her trial as an accessory after the fact. My first ground of appeal is that evidence was wrongly admitted. The appellant did not give evidence at the trial, but he had made various statements to the police which were put in evidence by the prosecution. One of these was made to the police on the 4th November, 1917, at Bow Street Police Station in answer to questions put by a police officer in French, answered by him in French, and the answers written down in English in narrative form. He was then given a number of pieces of paper and asked to write the words "Bladie Belgiam." He wrote them several times, and the handwriting and mis-spellings of both words was relied on by the prosecution. No caution was given by the police,

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either before questioning him or before asking him to write these words, although he was in custody at the time, as was held by Darling J. It is true that the police stated that they had not yet decided to arrest him, but after he had made a long statement to the police at his own house on the 3rd November he was told that the matter was a grave one and he must go to the police station, where he was detained on the night of the 3rd November, and he in fact never regained his liberty. He would not have been allowed to leave the police station. It is the evidence of the writing of which I complain, and to which I objected at the trial, but Darling J. admitted it on the authority of *Ibrahim* v. *R.*, 1914, A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383; 24 Cox C. C. 174. The writing was obtained from an illiterate foreigner in custody with all his continental dread of the police—without any caution—and I submit was inadmissible on the ground that it was obtained by the police outside the scope of their duty, either by setting a trap for the appellant or by an endeavour to manufacture evidence by putting questions to a prisoner and thus usurping the functions of the Court.

[A. T. LAWRENCE J.: In October, 1912, the question of enquiries and questions by the police was considered by all the judges of the King's Bench Division, when the following formal statement was agreed upon and issued to the police:—

1.—When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2.—Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any question or any further questions as the case may be.

3.—Persons in custody should not be questioned without the usual caution being first administered.

4.—If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words ("against you") of such caution should be omitted, and that the caution should end with the words "be given in evidence."]

Here the judge has held that the appellant was in custody and the same principles should apply. A prisoner should not be asked to assist the prosecution to prove the case against himself. It

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was stated in the judgment in *Ibrahim* v. *R.* that the English law is still unsettled, and it would be of great advantage if this Court would lay down a rule. I submit that the practice followed by the police here is so mischievous that evidence so obtained ought to be excluded. The matter has come before the Court on several occasions, such as *Male and Cooper*, 17 Cox C. C. 689, 1893, which is in my favour; *Gavin*, 16 Cox C. C. 656, 1885, which is incorrectly stated to have been overruled by *Best*, 1909, 1 K. B. 692; 78 L. J. K. B. 658; 100 L. T. 622; 25 T. L. R. 280; 2 Cr. App. R. 30; *Brackenbury*, 17 Cox C. C. 628, 1893; *Rogers* v. *Hawken*, 67 L. J. Q. B. 526; 78 L. T. 655; 62 J. P. 279; 19 Cox C. C. 122, 1898, approves *Male and Cooper*; and *Histed*, 19 Cox C. C. 16, 1898, is a case of a "trap"; *Lewis* v. *Harris*, 110 L. T. 337; 78 J. P. 68; 24 Cox C. C. 66; 58 L. J. 156; 30 T. L. R. 109, 1913, is distinguishable because there evidence was excluded on the ground that no caution had been given when there was no necessity for a caution. In *Knight and Thayre*, 20 Cox C. C. 711; 69 J. P. 108; 21 T. L. R. 310, 1905, Channell J. refused to admit in evidence the latter part of a long statement although there was no certainty when the prisoner made it that he was going to be arrested. Even if it is only a rule of practice this Court ought still to review the exercise of the discretion of the judge.

Further, the judge misdirected the jury; he commented on the fact that the appellant had not gone into the witness-box and said he thought that I had exercised a wise discretion in keeping him out. This was equivalent to an expression of the judge's personal opinion of the appellant's guilt. The comment of a judge on such matters must be "legitimate and necessary":—*Kops* v. *R.*, 1894, A. C. 650; 64 L. J. P. C. 34; 6 R. 522; 70 L. T. 890; 58 J. P. 668; *Rhodes*, 1899, 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; 19 Cox C. C. 182, and this comment went beyond that standard. He also commented on the fact that Madame Roche had not been called as a witness. She was bitterly hostile to the appellant, and was awaiting her trial as an accessory, and it would have been most dangerous for me to call her. The judge also misstated on material points the evidence of the crime, and omitted to present to the jury certain very important evidence which was in favour of the appellant, such as the condition of the head of

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the deceased, which had seventeen distinct cuts or wounds. That was inconsistent with the appellant's guilt, since he was a butcher by trade.

The judge also omitted to present to the jury the possibilities in favour of the appellant's story arising from the fact that the murdered woman's body was found wrapped in one of Madame Gérard's sheets, probably the one actually off her bed at 50, Munster Square, and he also ignored the difficulty in the way of the Crown of explaining the blood-soaked condition of the carpet which their witnesses said was brought back by the appellant from Munster Square to Charlotte Street, where appellant's basement premises were, and where he lived with Roche, on the afternoon after the remains had been found in Regent Square. The words "Blodee Belgium" were scrawled on a piece of paper found between the woman's underclothes and the body.

Percival Clarke (with him *R. D. Muir*), for the Crown. (He was called on only with the regard to the omission to caution the appellant before asking him to write "Bladie Belgiam.") There was no need for a caution. A statement made after arrest is admissible if made voluntarily and not as a result of pressure or threat:—*Ibrahim* v. *R.*, which has been approved by this Court in *Colpus & Boorman*, 1917, 1 K. B. 574; 86 L. J. K. B. 459; 16 L. T. 703; 33 T. L. R. 184; 81 J. P. 135; 61 S. J. 269; 12 Cr. App. R. 193. Here the police had not at the time the writings were made any information which would have justified them in arresting the appellant. It was made on the 4th November; the head and hands of the deceased were not found until the 5th November, and according to the evidence of the police it was only after they had been identified on the 6th November that they decided to arrest the appellant. There is no case that lays down that the omission to caution a person in custody renders evidence inadmissible, even if a caution would have been desirable.

May in reply. ,, A. L. B. T.

C. a. v.

11 *February.* The following judgment of the Court was read by A. T. Lawrence J.:—The appellant and a woman named Berthe Roche

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were indicted for the murder of Emilienne Gerard. A verdict of *Not Guilty* was directed by the judge in the case of Roche. The jury found the appellant, Voisin, guilty of murder and he was sentenced to death. He has appealed to this Court against his conviction on the grounds of misdirection and misreception of evidence. The argument on misdirection may be dealt with quite shortly. Mr. May, who appeared for the appellant and presented his case with considerable skill, had to admit that the passages from the summing up on which he relied as misdirection did not in themselves amount to directions in point of law, but were comments on the evidence, from which, he said, the jury would infer that the judge was of opinion that the appellant was guilty. He argued that, as there were three or four such passages in the summing up, they had a cumulative effect, and amounted together to misdirection in law. We think that this argument is founded on an erroneous view of the law. Comments on the evidence which are not misdirections do not, by being added together, constitute a misdirection. The only ground of appeal where such cumulative effect of a judge's observations is relied on is where it can be said that they have caused, or contributed to cause, a miscarriage of justice. Mr. May could not, and did not, suggest that there had been any miscarriage of justice in this case, and it is plain to us that the learned judge was throughout endeavouring, in the case of a very horrible murder, to be scrupulously fair to the prisoner. The judge's comments on the appellant's not going into the witness box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this Court to review. It was a case demanding explanation by the only persons who could know the facts if ever one could be. For both the rooms occupied by the appellant and Roche and those occupied by the victim contained many traces of human blood, and in the appellant's cellar was found the head and hands of the dead woman. Both the appellant and Roche had keys of the deceased's flat and the appellant had the key of his cellar in his pocket.

The alleged misreception of evidence relates to a paper writing containing the words "Bladie Belgiam." This was written by the appellant at the request of the police at a time while he was being detained at Bow Street. The trunk of the body of the deceased woman had been found contained in a parcel in Regent

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Square with a label containing these words on it. The police were making investigations, they had requested the appellant to go to Bow Street and to account for his movements at the supposed time of the murder, he had just made a statement which had been taken down in writing, and after he had done so he was asked whether he would have any objection to write down the two words above mentioned. He said, "Not at all," and then wrote them down, and it was argued that that writing was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant, and while he was in custody. A number of cases were called to our attention in which different views had been entertained by judges when statements by prisoners should, and when they should not, be excluded from consideration by the jury. It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend on the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim* v. *Regem*: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

The point of that passage is that the statement must be a voluntary statement. Any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibility. The question whether the person has been duly cautioned before the statement was made is one of the circumstances which must be taken into consideration, but this is a circumstance on which the judge should exercise his discretion. It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to shew that the person was not on his guard against the importance of what he was saying or its bearing on some charge of which he has not been informed. In this case the appellant wrote these words quite voluntarily. The mere facts that they

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were police officers, or that the words were written at their request, or that he was being detained at Bow Street do not make the writing inadmissible in evidence. They do not tend to change the character of the handwriting. Nor do they explain the resemblance between this handwriting and that on the label or account for the same mis-spellings occurring in both. There was nothing in the nature of a "trap" or of the "manufacture" of evidence. The identity of the deceased woman had not at this moment been established, and the police, though they were detaining the appellant in custody for inquiries, had not then decided to charge him with this crime, indeed, if the writing had turned out other than it did and other circumstances had not subsequently happened it is certain that he, like others who were similarly detained, would have been discharged.

It is desirable in the interests of the community that investigations into crimes should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made in the circumstances here proved was inadmissible in evidence.

We think an error has crept into Lord Sumner's judgment in *Ibrahim's* case, where he is made to say that the actual decision in *Rex* v. *Best* [above] was that, under the proviso of s. 4 of the Criminal Appeal Act, 1907, the Court would not interfere. As reported in the Law Reports (*a*) there is no allusion to the proviso of s. 4.

He read that case as deciding that the mere fact that a statement is made in answer to a question put by a police-constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion to exclude the evidence, but he should do so only if he thinks that the statement was not a voluntary one in the sense above-mentioned, or was an unguarded answer made in circumstances that rendered it unreliable, or unfair, for some reason, to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This would be evidence admissible in law,

(*a*) And other Reports.

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unless it could be fairly inferred from the other circumstances that it was not voluntary.

In 1912, the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE A. T. LAWRENCE.

ARTHUR THOMPSON.

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Order of House of Lords made an Order of this Court.

The appellant was admitted on May 24th, 1917, to bail pending an appeal to this Court. On June 18th the appeal was heard, and on July 9th judgment was given dismissing it (*a*). On July 26th bail was granted pending an appeal to the House of Lords. That appeal was heard in due course, and on January 24th, 1918, was dismissed (*a*).

Muir, for the Crown, now moved that the Order of the House of Lords, dismissing the appeal, should be made an Order of this Court.

Langdon, K.C. (with him *Huntly Jenkins*), for appellant, who was present, asked the Court to direct the release of the appellant in view of the length of time during which the proceedings had been pending, to his good record in the Army, and to the willingness of his Commanding Officer to receive him back.

The Court refused the application. An Order was made directing that the Order of the House of Lords, dismissing the appeal, should be made an Order of the Court, and that the appellant

(*a*) 12 Cr. App. R. 261; 13 Cr. App. R. 61.

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should be committed to custody to serve his sentence. The time during which he had been "specially treated" in custody as an appellant was allowed to count as part of the sentence.

Appeal dismissed.

Solicitor for the Appellant—*Harry Wilson.*

G. B.

The Court, consisting of Darling, Bray, and A. T. Lawrence JJ., also sat on February 13th.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE SHEARMAN.

ROBERT HOWARTH.

1918
18 *February.*

When after the summing up a witness is recalled and interrogated, a defendant has a right to cross-examine him and to give evidence in rebuttal.

This was an appeal against conviction and sentence by leave of the full Court Appellant was convicted on the 14th January, 1918, at the Lancashire (Salford Hundred) Sessions, of larceny, and was sentenced to six months' imprisonment with hard labour.

Thoresby, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing £39 7*s.* in silver and £14 in gold, the property of a Mrs. Rowley. The jury retired at 3.36 p.m. and returned into Court at 3.43, when they said they wished that Mrs. Rowley should be asked a question. The chairman then on their behalf asked Mrs. Rowley whether the appellant knew she had money in the house, and had he any idea where it was kept? She said she thought he did know, and the chairman asked "Why?" She answered, "On Sunday, before the money was taken on the Tuesday, he told the woman he was living with he had no money, and he went up to my son's hen pen and gave 8*s.* for four little bantam fowls, and I wanted to know where he had the money from, and yet he told the woman he was living with he had no money. So where did he get that from? And when I went to the drawer on the Monday, the bag as I usually have laid down flat, with the money in, had been upset, and I told Mrs. Howarth I was afraid he knew where this money was, and that he had been to the drawer, and that I had got some suspicion of it." This evidence is largely hearsay and evidence of a conversation at which the appellant was not present, and was therefore inadmissible. Moreover the appellant ought to have been given an opportunity of cross-examining the witness on this evidence, and, if he desired, of giving evidence and addressing the jury on the point; the chairman prevented his cross-examining, although he said he wished to cross-examine. At 3.46 the jury convicted him. (He was stopped by the Court.)

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Jordan for the Crown. The chairman followed the rule that, where a question is put to a witness by the judge, neither counsel is allowed to cross-examine on the answer. If the question here was not within that rule I admit that the appellant has been deprived of his full rights. Even in that case I submit there has been no miscarriage of justice.

DARLING J.: In this case there was ample evidence on which the appellant might have been convicted of the larceny with which he was charged. But it is said that there was a fault in the trial which arose in this way. The jury came back into Court and asked whether the prosecutrix knew whether the appellant was aware that she had the money in the house. Mrs. Rowley was recalled and asked two questions, and, without going into the form of the questions, her answer for a great part was not legal evidence, and it certainly gave the appellant a right to reply to, and deal with, it. The learned judge repeated her words [above]. It is plain that after that the appellant had the right to go into the witness-box and rebut the evidence. Later the clerk of the Court put this perfectly proper question to him: "Do you want to ask her any questions on that evidence?" The appellant said, "Yes, sir." The right procedure would have been to let him put questions and then to ask him whether he wished to give evidence; especially as he was not represented by counsel. But the chairman said, "It was suggested to him and of course he said 'Yes'." Of course it was suggested, and it is clear that the chairman deprived the appellant of his right to ask questions and to give evidence rebutting what Mrs. Rowley had said if he wished to do so. On these grounds it is impossible to allow the conviction to stand. We could only do so if we were satisfied that there had been no miscarriage of justice. It is clear that there was strong evidence against the appellant, but it may be that it would not have been conclusive to the minds of the jury but for the additional evidence. The appellant is a soldier and a deserter. We are always sorry to have to quash a conviction which was probably a proper one. Here the appellant is in custody, and it is a consolation to know that he can be made to do his duty to his country.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

CHARLES AUGHET.

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The decision of a foreign court-martial may, by virtue of a treaty between this country and the foreign state, be that of a competent Court for the purposes of a plea of autrefois acquit (*or* autrefois convict).

Whether the fact that a defence is available in a competent Court of a foreign country but is not available in this country on the same charge is a bar to such a plea, quære.

The appellant was convicted on January 23rd, 1918, before Mr. Justice Darling, at the Central Criminal Court, of maliciously wounding, contrary to s. 20 of the Offences Against the Person Act, 1861, and was sentenced to five months' imprisonment in the second division. He now appealed against his conviction.

Hawke, K.C. (*Sir A. Bodkin* with him), for the appellant, who was on bail: The indictment on which the appellant was tried charged him with the following offences:—Count 1: Attempted murder, contrary to s. 14 of the Offences against the Person Act, 1861. Count 2: wounding with intent to murder, contrary to s. 11 of the Act. Count 3: wounding with intent to do grievous bodily harm, contrary to s. 18 of the Act. Count 4: maliciously wounding, contrary to s. 20 of the Act.

The appellant was a lieutenant in the Belgian army. He was arrested in England for shooting at and wounding in London a Belgian private named de Dryver. The proceedings at the police court were adjourned to enable him to be tried by a Belgian court-martial sitting at Calais, by which he was acquitted. He returned to England, and was put on his trial on the indictment referred to

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above. A plea of *autrefois acquit* was put in on his behalf. The jury, under the direction of Darling J., returned a verdict to the effect that the appellant had been *autrefois acquit* on the first three counts, but that he had not been *autrefois acquit* on the fourth count.

It is submitted that the offence with which the appellant was charged before the Belgian court-martial was that with which he was charged in this country. It is true that the defence of irresistible impulse, which is no defence here, was open to him under Belgian law (see Art. 71 of the Belgian Penal Code). But that is immaterial. It does not affect the essence of the offence charged. If the essence of the offence charged against the appellant in this country was the same as that of the offence with which he had been charged at Calais, he had been *autrefois acquit*. Articles 392, 393, 394, 398 and 399 of the Belgian Penal Code constitute a complete code of the law of unlawful wounding, which is the same as the law of this country on that subject. The offences are the same, and the plea of *autrefois acquit* is a good plea. The appellant's acquittal by the Belgian court-martial was therefore a complete bar to proceedings here.

Muir (with him *Roland Oliver*) for the Crown: The law on the point was stated in Chitty's Criminal Law (2nd ed.), Vol. I., at p. 456, as follows:

"But if the former charge were such an one, as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were for a felony or stealing, and the second for a mere misdemeanour, the previous acquittal will be no bar, for a felony or larceny cannot be modified on the trial into a trespass or misdemeanour. And it often happens, that after an acquittal of the felony, the defendant is indicted and tried for the misdemeanour upon the same evidence, and it would be no objection, though the judge might still think that there was evidence of the felony to have gone to the jury. Thus also if a defendant be indicted for a burglarious entry and a stealing, and acquitted, he may still be tried for a burglarious entry with intent to steal; for although the burglary be the same, it is evident the prisoner could not have been found guilty on the first, upon proof of a mere intention, and therefore may well be indicted for that offence in the second. It is, indeed, generally laid down,

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that an acquittal of burglary will not prejudice an indictment . . . for larceny, or *vice versâ;* but this must be understood of those cases, in which, like that we have just stated, the former charge did not necessarily include the latter. On the same ground, if a robbery be committed in one county, and the goods be carried into another, so as to make it larceny there an acquittal of the larceny in the last county will not prejudice an indictment for robbery in the first."

The question was considered in *Barron,* 1914 2 K. B. 570; 83 L. J. K. B. 786; 78 J. P. 311; 58 Sol. J. 557; 30 T. L. R. 422; 10 C. A. R. 81. Part of the head-note is as follows: "The acquittal of the whole offence is not an acquittal of every part of it." In the argument in that case counsel referred to the case of *King,* 1897 1 Q. B. 214; 66 L. J. Q. B. 87; 75 L. T. 392; 18 Cox C. C. 447; 61 J. P. 329; C. C. R., where Hawkins J. said: "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not in their legal operation." The head-note to the report of *King's* case (above) states that a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods. The Lord Chief Justice delivered the judgment in *Barron's* case (above), and after referring to the judgment of Hawkins J. in *King,* 1897 1 Q. B. 214, cited in argument, said: "It is quite plain that the learned judge did not intend to lay down, and did not lay down, as a general principle of law, that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, 'practically the same' the words are, and as the two offences in the present case are not either exactly or practically the same, it does not help the appellant." The case of *Barron* covers the present case. [He also referred to *Norton,* 5 Cr. App. R. 197 (1910).] In *Gilmore,* 15 Cox C. C. 85 (1882), the prisoner was acquitted on a charge of doing certain acts with intent to endanger the safety of passengers on a railway, which was a felony, and he was then indicted for doing the same acts without the intent, which was a misdemeanour. Although the same evi-

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dence would be given on each charge, Huddleston B. held that a plea of *autrefois acquit* was not a good one.

The Calais court-martial was not a competent court to acquit or to convict the appellant of the offence of unlawful wounding which is charged in the indictment here. Moreover, the crimes charged in the two counts were not identical. The defence of uncontrollable impulse was open to the appellant under the Belgian law. It was not open to him under English law. Therefore the two offences were not the same, since the Belgian offence was subject to an exception which did not apply under English law. The plea of *autrefois acquit* cannot be a bar unless the two crimes are identical, wherever the respective trials take place. See Hawkins, Pleas of the Crown, Chap. 35, sect. 10 (edn. 1824). It is submitted that you cannot ascertain the elements of a crime unless you know the kind of defence which can be set up, and whilst uncontrollable impulse is a defence under Belgian law, it would be no defence according to English law.

The offence charged against the prisoner here differed from that charged against him before the Belgian court-martial in another respect. There is no period of limitation in regard to prosecutions for crime in England. In Belgium, a delay of three years in some cases, ten years in others, would be a bar to a prosecution. The argument on behalf of the appellant would involve that a Belgian being tried in an English court would have the benefit of the Belgian law, which an Englishman could not have.

The appellant had been acquitted by a court-martial, not by a civil court. If the appellant had been convicted by a court-martial in England of a crime which was both a military and a civil crime, he could not plead that in bar of a conviction in a civil court. Nor can an acquittal by a court-martial be so pleaded (see s. 162 of the Army Act, 1881), and it cannot be possible for the appellant to be placed under a better position as he was tried by a Belgian court-martial than he would have been if he had been tried by English court-martial.

C. a. v.

8 *March.*

March 8.—A. T. LAWRENCE J. read the following judgment of the Court:—The appellant, Aughet, is an officer in the Belgian army, and in July last was sent by his Government on a special mission to London to enquire into an alleged fraud against them.

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He occupied a room in Kingsway, London. Upon the 28th of that month one de Dryver, a private in the Belgian army, entered his room and, in a dispute which arose between the two men, de Dryver used language of a most insulting and provocative character with regard to Aughet's wife. The appellant took out a revolver and shot at and wounded de Dryver.

Upon the 30th July the Auditeur Militaire of the Belgian army, sitting in London, took the appellant's depositions, and the appellant was handed over to his custody as representing the Belgian military authorities. On the 21st September the appellant surrendered at Bow Street, and at a hearing before the magistrate it was stated that he was to be tried by court-martial by the Belgian authorities, and the magistrate adjourned the hearing for six weeks. Upon the 8th October, the appellant was tried by the court-martial sitting at Calais.

The English and Belgian Governments had previously entered into a convention with regard to the trial of offences committed by soldiers, the material parts of which are as follows:—"The Governments of their Majesties the King of Great Britain and Ireland and the King of the Belgians are agreed during the present War to recognise the exclusive right of jurisdiction of the tribunals of their respective armies in the field in regard to persons belonging to those armies, irrespective of the nationality of the accused or of the territory in which the armies are operating. . . . . The two Governments also agree to recognise, during the present War, the exclusive right of jurisdiction on British territory, of the British tribunals respecting all persons not belonging to the Belgian army committing acts prejudicial to the said army; and the exclusive right of jurisdiction on Belgian territory of the Belgian tribunals respecting persons not belonging to the British army committing acts prejudicial to the said army."

The Belgian law on the subject of the crime of wounding, so far as it is material to the present case, is contained in two Articles of the Penal Code numbered 398 and 399, which are as follows:—"Quiconque aura volontairement fait des blessures ou porté des coups, sera puni d'un emprisonnement de huit jours à six mois et d'une amende de vingt-six francs à cent francs, ou d'une de ces peines seulement. En cas de préméditation, le coupable sera condamné a un emprisonnement d'un mois à un an et à une amende de cinquante francs à deux cents francs.

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"399. Si les coups ou les blessures ont cause une maladie ou une incapacité de travail personnel, le coupable sera puni d'un emprisonnement de deux mois à deux ans et d'une amende de cinquante francs a deux cents francs. Le coupable sera puni d'un emprisonnement de six mois à trois ans et d'une amende de cent francs à cinq cent francs, s'il a agi avec préméditation."

The appellant was charged under Article 399. Under Article 71 of the Penal Code it was open to him to set up as a defence that he was compelled to commit the acts charged against him by a force which he was unable to resist. He did set up this defence, which is one not known to English law, and the Court held it to be proved and acquitted him. The appellant returned to England. The hearing at Bow Street was continued on the 2nd November, and he was committed for trial upon the 11th November. The trial came on before Mr. Justice Darling upon the 9th and 10th of January, when the appellant was indicted on four charges, the first three of which were for felonies of the nature of wounding with intent. The fourth was for the misdemeanour of unlawful wounding. The appellant pleaded in respect of each of the counts the plea of *autrefois acquit*. To this plea the prosecution made three answers. They said first, that as the appellant had been acquitted by reason of a defence not open to him in our law, the crime for which he had been acquitted was not the same crime as that with which he was charged in England, and therefore he could not plead the acquittal in bar. Secondly, that the court at Calais was not a court of competent jurisdiction, and thirdly, that the charge under Article 399, upon which he had been acquitted, was not the same as the charge of unlawful wounding contained in the fourth count in the indictment, and therefore the appellant had never been tried upon the charge contained in that count, and could not have been acquitted of it.

Evidence was given, and the learned judge held that the first contention of the prosecution was no answer. He held, however, that the third answer of the prosecution was correct, and that the appellant had never been tried upon a charge of unlawful wounding, and therefore was not entitled to plead *autrefois acquit* in respect of the fourth count of the indictment. He so directed the jury, who found the plea of *autrefois acquit* proved in respect of the first three counts, but further found that the plea was not proved in respect of the fourth count.

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In the result the appellant was tried upon the fourth count, found guilty, and sentenced to five months' imprisonment without hard labour.

He brings this appeal upon the ground that the judge misdirected the jury in telling them that the appellant had not proved the facts necessary to establish the plea of *autrefois acquit* in respect of the fourth count.

Three points fall for our decision. First, was he charged at the court-martial with, or could he have been convicted of, the crime of unlawful wounding set out in the fourth count of the indictment? Second, does the fact that a defence was open to him in Belgian law which he could not have set up under our law alter the character of the crime? Third, was the court-martial a court of competent jurisdiction?

First, the prosecution contended that although Article 398 of the Belgian Code described an offence equivalent to the unlawful wounding charge in the fourth count of the indictment, the appellant was not proceeded against under this Article, but the *acte d'accusation* charged him with an offence under Article 399, which was different from, and a greater offence than, unlawful wounding. They further alleged that there was no power in the court-martial in a case where a man was charged with the greater offence to find him guilty of the less offence. Evidence had not been given upon this point in the court below, and we decided, at the conclusion of the first day's hearing, to allow both parties to call witnesses to settle it. The next morning, however, Mr. Muir announced that the attention of his Belgian legal expert had been drawn to a case in the Cour de Cassation which held that the court-martial had such power, and he admitted, therefore, that the appellant might have been convicted of an offence the same as our offence of unlawful wounding. The third answer made by the prosecution to the plea therefore fails.

On the second, we do not think, having regard to the view we take of this matter, that it is necessary to give a direct decision on the point.

Further, it was contended by the prosecution that the court was not a court of competent jurisdiction for the purpose of such a plea, because (a) it was a court-martial, and (b) it had no jurisdiction under the Belgian Code to try the appellant at Calais, as it is not in Belgium.

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It was said that a conviction or an acquittal by an English court-martial cannot, by reason of s. 162 of the Army Act, 1881, be pleaded in bar in a civil court in England, and that the decision of a Belgian court-martial could not place an accused in a better position before an English civil court than a decision of an English court-martial would. It was further contended that under the Code d'Instruction Criminelle, although by Article 7 every Belgian who committed a crime or an offence against a Belgian outside Belgium could be prosecuted in Belgium, this could only be so under Article 12 if the accused was "found in Belgium"; that he had not been "found in Belgium," and that therefore the court had no jurisdiction. We think that the latter point proceeded upon a too technical construction of Article 12. By Article 59 of the law of the 15th June, 1899, with reference to the Belgian army, it is provided that in time of war the King of the Belgians can alter the seat of permanent courts-martial, and we are satisfied on the evidence that the court-martial was properly constituted at Calais under decrees of His Majesty. We think that the words "found in Belgium" mean "found within the jurisdiction of the Belgian courts," and that the fact that the court-martial was properly constituted at Calais, and the appellant was tried at Calais, satisfies the words that he was "found in Belgium," that is to say, was found in a place where the Belgian jurisdiction was being lawfully and properly exercised pursuant to the Belgian Convention with France.

We have already stated that we do not consider it necessary to decide the question whether the additional defence allowed by Belgian law alters the character of the crime, and we also do not think it necessary to decide the point whether an acquittal by a Belgian court-martial could in ordinary circumstances be pleaded as a bar in the English courts for the following reasons:—The Convention which was signed between this country and Belgium, to which reference has already been made, provided that the Belgian authorities should try Belgian soldiers for offences committed by them against other Belgian soldiers. The offence committed by the appellant was an offence committed by him against a fellow soldier; he was handed over by the English authorities to the Belgian authorities for trial, and he submitted himself to the jurisdiction of the Belgian court-martial; the court-martial which tried him was competent to do so under Belgian law; they tried

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him properly under that law, and they acquitted him. We think that in these circumstances it would be contrary to the true intent and meaning of the Convention to subject the man to punishment here for an offence for which he has been in jeopardy and has been acquitted in accordance with Belgian law. It was entirely due to the fact that there was no evidence adduced at the trial to show what is now admitted to be Belgian law as established by a decision of the Cour de Cassation that Mr. Justice Darling did not hold his plea to be good to the fourth count as he had held it to be to counts one, two, and three.

The Convention does not affect or diminish the jurisdiction of the King's Courts over crimes committed in this country, but where its provisions have been observed it would be unjust to the prisoner not to accept a decision of a competent court in his favour.

The provisions of our Army Act with regard to courts-martial are based upon principles of high policy which have, in our opinion, no application to decisions of Belgian courts-martial held pursuant to the Conventions existing between the Allies. It is not necessary, therefore, to consider some of the wider principles which were argued before us, but we base our decision upon the fact that as the English authorities handed over the appellant to be dealt with by his own countrymen, under their own laws, and as this has been done, the appellant is entitled to rely upon the plea of *autrefois acquit*, and that the conviction registered against him must be quashed.

Conviction quashed.

Solicitors for Appellant—*Michael Abrahams & Sons.*

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE, AND MR. JUSTICE LUSH.

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1 *March.*

EDWARD TRELAWNEY CLARENCE ANSELL.

Sentence ought not to be mitigated in view of meritorious military service.

The applicant was convicted on January 31st, before Avory J., at Exeter Assizes, of obtaining money by false pretences, and was sentenced to three years' penal servitude. He now applied for leave to appeal against his sentence.

W. T. Lawrance, for the applicant, who was not present. The notice of appeal had been drawn up by the applicant himself. In that notice the applicant complained that at the trial the assistant provost marshal had given incorrect evidence with regard to his (the applicant's) military service. He set forth his record of service in some detail, and concluded:—"As these letters prove, I have done my country good service and, in those days, asked no recompense, but now that I have broken the laws of my country I ask that the good I once did may be put in the balance of the scales of justice, and be allowed to offset the bad I have done, and earn for me a mitigation of my sentence." The chief ground, however, of his present application was that at the trial certain statements by him about his military services were contradicted by the Assistant Provost-Marshal. Applicant mentioned at the trial that he had written for documents relative to his military services, but that they had not arrived. They did, however, arrive the day after the trial, were now in Court, and proved his statements. If produced at the trial it was quite conceivable they would have influenced the learned judge in the sentence.

The Crown was not represented.

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EDWARD TRELAWNEY CLARENCE ANSELL.

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DARLING J.: As a ground for this application, the applicant says that he has served in the army and has done good service. That is true. No judge, however, ought to say that the fact that a man has served well in the army may be reckoned as giving him a right to commit crime when he is away from the army. The applicant asks that "the good I once did may . . . . be allowed to offset the bad I have done, and earn for me a mitigation of my sentence." We are not at all surprised that at last this matter has been brought to our attention by a convicted criminal in these terms. No one who has observed the administration of justice with regard to soldiers lately can affect to be unaware of a practice which has been adopted in certain courts of allowing soldiers who commit crimes to go practically unpunished. We who sit as judges of the King's Bench Division do not live in convents away from the world. We know perfectly well what is the public opinion on this matter. I think that it should be known that recently the judges of this division had a meeting at which this subject was discussed, and that that meeting recognised the evil which had been done, and came to a conclusion on the course which the judges who were present would themselves pursue. There is no doubt that the applicant has noticed that there has grown up in certain quarters a practice of treating soldiers who have done good service as soldiers quite differently from civilians who have committed the same crimes. We know that that has placed in the greatest difficulty those who have to deal with sentences where judges have passed them, with regard to remissions, indulgences and so on. At the meeting to which I have referred we had to consider this matter from the point of view of our own guidance, and also from that of the public safety generally. It has become manifest—and what the applicant has done has merely crystallised the matter—that there is among certain people an idea that, as the applicant says, you may set off good military service against the commission of civil crimes. That is equivalent to saying to a man: "If you have performed good military service you may murder your wife, outrage a woman, and commit I do not know how many bigamies, and yet go free." If that is to prevail, then a "mention in despatches" or the possession of a military medal will become a licence to commit crimes. It is the opinion of the Court that there must be an end to any encouragement to such a view as the applicant in this case evidently

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EDWARD TRELAWNEY CLARENCE ANSELL.

Darling J.

holds, and which he has obtained from his reading of what has happened. The practice which I have referred to is, in our view, a most maleficent one. When the question of sentence is under consideration each case must be judged on its own merits, and on nothing else. The application will be dismissed.

Application dismissed.

Solicitors—*Coode, Kingdon and Cotton,* agents for *Gould and Stephens,* Exeter.

G. B

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SALTER.

AUGUSTA DE MUNCK.

1918
11 *March.*

Prostitution within the meaning of the statutes is the offering for reward, by a female, of her body commonly for lewd purposes.

The appellant was convicted on January 31, before Judge Atherley Jones, at the Central Criminal Court, of attempted procuration, of having for gain exercised control over the movements of a prostitute in such a manner as to shew that she was aiding her prostitution, and of causing or encouraging the prostitution of a girl under the age of 16 years, and was sentenced to fifteen months' imprisonment with hard labour. She now appealed against her conviction and sentence.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The appellant was charged on an indictment containing twelve counts. Counts one to four charged her with attempting, on certain dates in 1917, to procure Kathleen de Munck to become a common prostitute (Criminal Law Amendment Act, 1885, s. 2 (2)). Counts five to eight charged her with having, on the same dates, exercised control over the movements of a prostitute, namely, Kathleen de Munck, in such a manner as to shew that she was aiding her prostitution (Criminal Law Amendment Act, 1912, s. 7 (4)). Counts nine to twelve charged her with, on the same dates, while having the custody of a girl under 16, namely, Kathleen de Munck, caused or encouraged her prostitution (Children Act, 1908, s. 17 (1)). Kathleen de Munck, who had not quite reached the age of 15, was the daughter of the appellant. It is useless to combat the evidence which was accepted by the jury as fact, and therefore it is admitted that the

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appellant was in the habit of going out with her daughter, of accosting men in the parks or in the streets, and of taking them home, where she allowed them to be for a considerable time in rooms alone with her daughter, and that she received money from those men. At the applicant's request, however, made after her arrest, the child was medically examined, and conclusive evidence was given at the trial that she (the child) was *virgo intacta*. Whatever abnormal means of sexual indulgence were adopted by the men who visited the house, it is clear, therefore, that natural sexual intercourse did not take place between them and the girl. It is submitted that a *virgo intacta* cannot be a prostitute. The word "prostitute" is capable of very wide meaning indeed, but when used in the statutes in question here it clearly only refers to the prostitution of the body for sexual indulgence. But, in view of the abnormalities of the sexual appetite which are known to exist, the meaning still remains wide and somewhat vague, and the statutes which the Court now has to consider are penal statutes, and must be construed strictly. It is submitted, therefore, that the only safe course is for the narrowest construction to be placed on the word "prostitute," and that it should be held to refer only to natural and normal sexual connection. There is no case in the books where it has been given a wider meaning. If this argument is right, it follows that the conviction must be quashed. That result follows clearly with regard to the conviction on counts five to twelve, and it also follows with regard to that on the first four counts, which charged attempted procuration. The learned Commissioner directed the jury that the term "prostitute" was not "necessarily confined to ordinary, natural sexual intercourse." Assuming, therefore, that there was some evidence of attempt to procure, the jury, through that misdirection, never considered whether the appellant attempted to procure the girl to have normal connection with men.

Percival Clarke for the respondents: The direction of the learned Commissioner was accurate. The words "prostitute" or "prostitution" in the Acts should not be given the limited meaning which is contended for. The Court need not consider what actually occurred between the child and the men who were taken home if it is satisfied that there was evidence on which the jury could find that the child was offered in some way for indiscriminate lewd-

ness for gain. (He referred to Mead and Bodkin on the Criminal Law Amendment Act (4th ed.), p. 121, note "Prostitution.")

DARLING J.: The appellant was convicted on an indictment containing twelve counts, framed under three different statutes. The substance of all the offences charged is the procuring or attempting to procure a girl to become a common prostitute. The only question for the Court on all the counts is whether what the appellant did amounted to procuring or attempting to procure her daughter to become a common prostitute. The evidence is that she permitted her daughter to take men home into the house where she (the appellant) herself was living, and allowed those men to be in private with the girl in circumstances which would have led anyone to suppose, had there been no medical examination proving her to be, in a medical sense, *virgo intacta*, that the girl had had connection with them. The medical evidence shewed, however, that the girl had never had sexual intercourse with a man in the ordinary way, but there was ample evidence from other sources to satisfy the jury—and they were satisfied—that there had been lewd conduct between the girl and the men who were brought to the house, that the girl exposed herself to them for the gratification of their sexual passion, and that her mother procured her to do so.

We have to decide what is a prostitute, or what is prostitution. The argument advanced on behalf of the appellant practically was that the offering by a woman of her body for the gratification of the sexual passions of men, even if it is done as a regular trade, indiscriminately and for gain, is not prostitution unless the men's passions are gratified by the act of sexual connection, and not otherwise. We have come to the conclusion that that contention is not well founded. It was advanced before the learned Commissioner at the Central Criminal Court, and he laid down the law practically as we are now going to lay it down, and we, therefore, uphold his decision. The Court is of opinion that the term "common prostitute" is not limited so as to mean only one who permits acts of lewdness with all and sundry or with such as hire her when such acts are in the nature of ordinary sexual connection. We are of opinion that prostitution is proved if it be shewn that a woman offers her body commonly for lewdness for payment in return. There is ample evidence in this case to support the

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verdict that this girl used to offer her body in such a way; and that her mother, who had control over her, used to charge, as she did in the actual instance before the Court, £2 to those who would be allowed by the girl to gratify themselves in this fashion. The fact that her mother knew that she was a virgin after such a long course of this practice suffices to shew that she knew perfectly well what the girl was doing.

Appeal dismissed.

Solicitors for Respondents—*Wontner & Sons.*

G. B.

HENRY WILLIAM MARCK.

Severity of sentence.
In a sentence for forgery regard should be had to the actual effect of the fraud.

The appellant, Henry William Marck, was convicted on January 10, 1918, before Sir Albert Bosanquet, Commissioner at the Central Criminal Court, of forgery, and was sentenced to five years' penal servitude.

C. Bray for the appellant, who was present: The appellant was convicted on an indictment charging him, on the first count, with forging a promissory note for ten guineas; on the second count with uttering the note, knowing it to be forged, and with obtaining £2 from a man named Bolton by false pretences. On September 17 the appellant took to one Eldridge two promissory notes drawn in his (the appellant's) handwriting, one for £15 10*s.* and one for £10 10*s.* The first note was made payable to Eldridge two months after date, and the appellant signed it. The second was made payable to the appellant three months after date (*i.e.*, on December 17), and Eldridge signed it. Evidence was given for the prosecution that on November 10 the appellant took a promissory note to Bolton, who had engaged him to work in his business, and asked him to lend him 50*s.* on the security of it. The note was typewritten, was dated September 1, 1917, was

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payable at three months after date (*i.e.*, on December 1), and purported to be signed by Eldridge. Bolton gave the appellant £2, and took the note. On December 5 he paid the note into his bank, but it was returned marked "signature repudiated." Eldridge, in evidence, denied that the signature to the note was his. It is submitted that the conviction of the appellant was against the weight of evidence, and cannot stand. [DARLING J.: It appears impossible to come to any other conclusion than that the appellant was guilty.] In any case it is submitted that the sentence was too severe. In imposing it Sir Albert Bosanquet regarded too much the character of the offence and too little its effect.

S. Moses, for the prosecution, drew attention to the fact that there were twelve previous convictions recorded against the appellant, including sentences of four years' penal servitude for false pretences in 1913, and five years' penal servitude in 1895.

SALTER J.: In our view, the conviction of the appellant must be affirmed. The effect of the discussion here, however, has been to illustrate more than was done at the Central Criminal Court that the only effect of what the appellant did was to impose on Eldridge a somewhat earlier liability than would have rested on him under the genuine promissory note which the appellant was entitled to deal with. It imposed no greater liability, and there could be no reasonable fear of any proceedings being taken to make Eldridge liable on the genuine note. Taking these new circumstances into consideration, we think that the sentence may fairly be reduced to one of nine months' imprisonment with hard labour.

Sentence reduced.

Solicitors for Appellant—*J. Westcott & Sons.*

G. B.

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LEONI SBARRA.

The circumstances in which property is received may in themselves be sufficient proof that it was stolen and that defendant knew that fact.
Proviso to s. 4 (1) of the Criminal Appeal Act applied.

This was an appeal against conviction on questions of law. The appellant was convicted at the Central Criminal Court on the 1st February, 1918, before Mr. Commissioner Atherley Jones, of feloniously receiving stolen property, and was sentenced to six months' imprisonment in the second division.

St. John Hutchinson for the appellant, who was present. The appellant was indicted for feloniously receiving tobacco and cigarettes. Three men, who were jointly indicted with him, pleaded guilty to the larceny, but they were not called to give evidence. The only evidence of the theft was given by the man in charge of the prosecutor's despatch department, viz., that a van containing the property was despatched for Fulham and Hammersmith, and that the goods were afterwards found in the appellant's shop, which was opposite to the prosecutor's place of business in Clerkenwell Road. They were proved to have been taken to the appellant's shop by the men who had pleaded guilty to the larceny. It was not proved that the goods never reached their destination, and some one there might have sent them, quite properly, to the appellant's shop. A submission was made at the close of the case for the prosecution that there was no evidence that the goods had been stolen, but the judge held that there was sufficient evidence, I submit wrongly.

If there was any such evidence, no direction was given that it was necessary for the prosecution to prove that the goods had been stolen. The judge said, "The goods did not apparently reach their destination because on the evening of the 5th January they were found, or a portion of them, at any rate, were found in the possession or control of men who have been rendered amenable to justice." It was not right to refer in this way to the fact that the other prisoners had pleaded guilty. The judge also said, "I have ruled, and you, gentlemen, will kindly accept that ruling, that there was sufficient evidence that the goods were stolen." He

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thus withdrew this question altogether from the jury. Further, the verdict was against the weight of the evidence.

Walter Stewart for the Crown. During my opening one of the thieves withdrew his plea of "not guilty"; the judge pointed out that this was no evidence against the appellant, so that matter was in the minds of the jury. The circumstances in which the property was brought, at night, to the appellant's shop were most suspicious. After some had been delivered one of the thieves was seen with similar parcels, which he dropped and then ran away. This alone is evidence of the theft. A presumption was raised which was no doubt rebuttable, but no evidence was called to rebut it. I had other evidence to prove the theft, but did not think it necessary to call it. The passage in the summing up, if it stood alone, would no doubt be a misdirection, but it must be taken in conjunction with the argument and the rest of the summing up, in which the judge referred to "the men who are supposed to be the thieves." In any case, there has been no substantial miscarriage of justice.

Hutchinson in reply. Evidence of guilty knowledge will not prove that the goods were in fact stolen. The prisoner may be mistaken.

DARLING J.: In this case the appellant was indicted for receiving tobacco and other goods knowing them to have been stolen, and after a trial before Mr. Commissioner Atherley Jones was convicted. It is complained that there is no evidence that the goods were stolen. It is pointed out that they were sent by the owners consigned to purchasers; they were afterwards found to have been in the possession of the persons from whom the appellant received them. It is true that there was no evidence that the goods were not delivered to the consignees, and it is argued that they may have got there and been sold, and so come honestly into the hands of the so-called thieves. There was evidence on many matters of the gravest suspicion with regard to the people from whom the appellant received the goods. They were dealing with them in the middle of the night, and deposited them on the appellant's premises by a side door, through which they were admitted by the appellant himself. Mr. Hutchinson submits that there was no evidence that

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the goods were stolen. Evidence on the question was available which those who had the conduct of the case did not use, and it is clear that everyone assumed that it was too clear for argument that the goods had been stolen, and no one could really doubt it. But the defence is entitled to insist upon proof that they were stolen, and proof of the stealing was not given.

Argument of a philosophical character has been addressed to us whether knowledge that the goods were stolen goods is enough to prove that the goods were in fact stolen, and at what point belief merges into knowledge. The Court desires to express the law in the following terms. The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft. We have come to the conclusion that the circumstances here were enough to prove that the goods had been stolen.

We therefore come to the second point raised—that of misdirection. We think that the judge did misdirect the jury, and that in one particular his summing up was very faulty; he hardly left the question whether the goods had been stolen to the jury at all. If we came to the conclusion that he absolutely withdrew the point from them we should not think it a case where we could apply the proviso to s. 4, but we do not think that he went as far as that. At the beginning he said, "The prisoner Sbarra is indicted for receiving goods, knowing them to have been stolen, and the essence, I need hardly tell you, of the offence is guilty knowledge, namely, that he must at the time have known them to be stolen property, and, secondly, I ought to remind you that the burden of proof of guilty knowledge rests with the prosecution; in other words, the prosecution is bound to satisfy you beyond any doubt which a reasonable man could entertain—not as to the probability, but as to the practical certainty of the crime having been committed by the man charged. Now the facts of the case lie within a simple compass. The goods belonged to a firm of tobacco merchants named Gallaher, and on the morning of the 5th January, 1918, they were despatched for delivery to a consignee at Hammersmith. The goods did not apparently reach their destination, because on the evening of the 5th January they were found, or a portion of them, at any rate, was found in the possession or control of men who have been rendered amenable to justice." He should not have said that; they were amenable to

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justice because they had pleaded guilty to the larceny in the presence of the jury, which was no evidence against the appellant. The fact that the goods had been stolen had still to be established by evidence. The judge went on, "I have ruled, and you, gentlemen, will kindly accept that ruling, that there was sufficient evidence that the goods were stolen." That may be read in two ways; Mr. Hutchinson reads it as absolutely withdrawing the case from the jury; we should agree if he had said "conclusive" or "irrefutable," but he did not; he said "sufficient," which may not be conclusive or beyond all reasonable doubt; so it may well be that he did not mean, and the jury did not understand, it to be a finding of fact that the goods had been stolen. He may have meant that there was evidence on which they could find the goods to have been stolen if they believed it. It is ill expressed, but it does not amount to a misdirection in law.

It therefore becomes necessary to enquire how the Court is accustomed to deal with cases, where a misdirection has been established, with reference to the proviso to s. 4. This is best expressed in *Cohen and Bateman*, 73 J. P. 352; 2 Cr. App. R. 197 (1909), where Channell J. said, "Taking s. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury must have come to the same conclusion." We have therefore to consider the circumstances here, and we are satisfied that if a right direction had been given the jury must have come to the same conclusion on this part of the case. We are of opinion that the misdirection made no difference. The case was perfectly plain, and it would have been hopeless in the face of the evidence which was given to ask the jury to say that the goods had not been stolen. So the proviso to s. 4 should be applied. We have come to the conclusion that no actual miscarriage of justice occurred.

Mr. Hutchinson further argued that the verdict was not justified. It is enough to say that on the evidence it was amply justified. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors for Appellant—*W. T. Ricketts & Son.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

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ROBERT SPARGO.

The standard of sentence must be raised to meet the increasing prevalence of a particular offence.

The principles on which sentences for bigamy should be imposed considered.

The applicant was convicted on February 27, 1918, before Bray J., at Durham Assizes, of bigamy, and was sentenced to fourteen months' imprisonment with hard labour. He now applied for leave to appeal against his sentence.

The appellant did not appear.

The Crown was not represented.

DARLING J.: In this case, the appellant pleaded guilty to a charge of bigamy, and was sentenced to fourteen months' imprisonment with hard labour. He was married in January, 1902, and he left his wife only three years ago (1915). Last year (1917) she obtained a separation order against him, under which he was to pay her £1 a week, but he paid nothing under that order. He joined the army, and has now been discharged with a pension. In December, 1917, he inserted this advertisement in a newspaper: "Friendless, discharged soldier in business; sober; intelligent; educated; seeks young lady's companionship. True friendship greatly appreciated." He was apparently not a Platonist. He got acquainted with a young woman, named Willis. At first she thought that he was single, and intercourse took place between them. On January 30, 1918, they were married. At the time of the "marriage" Miss Willis knew that the applicant was already married. The sentence imposed by Bray J. was the result of an opinion which he had formed in common with other judges, namely, that it is absolutely necessary to increase sentences in cases

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of bigamy. Bigamy is an every day crime among men who have enlisted in the army, and it has been greatly encouraged by some of those who have to administer justice practically making it known that in their view bigamy is a venial offence if the offender has worn khaki for a considerable time, and that if he has taken part in a certain meritorious retreat, he can commit that crime almost unrestricted. Bray J. rightly interpreted (*a*) the views of his brother judges of the King's Bench Division, and therefore this application must be refused.

Application dismissed.

G. B.

(*a*) The principles which were followed by Bray J. in sentencing the applicant, Spargo, were stated by him in an address to the persons who had been convicted of bigamy at the Durham Winter Assizes, 1918. The learned judge directed that all these persons should be brought up for sentence together, and in the course of his address he drew attention to the frequency of the offence of bigamy, especially in the case of soldiers, and mentioned that nearly 500 persons had been convicted during the previous twelve months. It was quite clear, he said, that something must be done to "stop the epidemic," and, so far as judges were concerned, that could only be effected by increasing sentences. Cases had appeared in the newspapers where, it appeared, a man had been released without any sentence because he had been to France and had been wounded, or was what was styled "A Mons Hero." Soldiers could not be allowed to commit the offence with impunity. In other cases, men had been allowed to go free as they had said they wanted to go to fight. In his opinion, that was not a plea to be considered by a judge, but by the Home Secretary, who had power to release a man at any time, and who had greater opportunities than a judge for knowing the urgency for releasing a man, and of inquiring into particular circumstances of cases.

The learned judge continued: "Now I have to arrive at what is the proper punishment, and I think I ought to lay down, for myself at all events, some sort of standard by which, in these cases, the punishment should be measured. I take what I may call for the moment a normal case. I take a case where a man has left

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his wife, and, perhaps, children, without any misconduct on the part of the wife, and has represented to some woman, very often a young girl, that he is unmarried, or is a widower, and is free to marry; and then, by deceiving her, has induced her to go through a form of marriage which she believes to be perfectly genuine, and which leads sometimes practically to her ruin. A man who commits an offence of that kind does a very serious wrong, or, rather, two very serious wrongs. He deserts his wife and children, possibly leaving them without any means of sustenance, and, it may be, driving them into the workhouse; and in every case where the wife is a loving wife it cannot but outrage her feelings, because she is humiliated and the family is disgraced. It is a very serious wrong. It is as great a wrong for a man to deceive a young woman and get her to live with him and marry her on the pretence that he is free to enter into a valid marriage. He may get her with child, and she may be ruined and disgraced.

What is the proper punishment in such a case as that where there are no other aggravating circumstances, and no extenuating circumstances? I have come to the conclusion that, in the case of a man (in my opinion, the case of a woman is not so serious), the proper punishment in such a case is a sentence of twelve months' imprisonment with hard labour. No doubt that is a heavier sentence than we were in the habit of giving before the war, but, as I have said, it is necessary it should be increased, and that, in my view, is the proper measure of punishment. If there are aggravating circumstances, and if the man is a man of bad character, he must have something more than that. If there are extenuating circumstances such as that the wife's misconduct has led to the husband deserting her, they should be taken into consideration. Further, there may be cases where the woman who has been living with the man before the bigamous marriage presses the man to enter into the marriage to make her what is called 'an honest woman.' That is an extenuating circumstance, and there may be others. Having made those general observations, I must now deal with the particular cases. . . ."

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE SANKEY, AND MR. JUSTICE SALTER.

MARY BROADHURST.
THERESA MEANLEY.
HERBERT BLISS HILL (*a*).

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In strict law a jury is only entitled to take into consideration the good character of the defendant when the evidence of the other facts in the case leaves them doubtful of his guilt.

The *Appellant, Bliss Hill,* in person. I am a solicitor, and I have practised in Wolverhampton for many years. Charles Jeffries, the testator of the will which has been held to have been forged, was my client. I acted for the applicants, Broadhurst and Meanley, who benefited under the will, in trying to obtain probate of it and in proceedings in the Probate Court and in the Court of Appeal. The judge at the trial in his summing up misdirected the jury in several instances on the facts and on the law, and did not sufficiently direct them on certain matters. He was wrong in directing the jury to consider the evidence in the case as affecting me apart from that of my character and reputation, and in not directing them to have regard to my proved character for life-long rectitude and integrity as affecting the credibility of my evidence, and the probability of my knowingly doing anything wrong, and to have regard to the especially ruinous consequences to me as a solicitor of knowingly making myself a party to any offence. Evidence of character should always be submitted to the jury with the other circumstances of the case

(*a*) See p. 85, above.

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to enable them to come to a decision on the whole of the evidence. (Russell on Crimes, 7th edit., p. 2119.) Avory J. did not leave the evidence of my character to the jury in this free way, but qualified it by telling them that it could only be taken into consideration if the remainder of the evidence left them in doubt.

[BRAY J. referred to *Stannard*, 7 C. & P. 673, 1837, *per* Patteson J. at p. 674, and *per* Williams J. at p. 675.]

The applicants, Broadhurst and Meanley, were not present, and were not represented.

Cecil Whiteley (with him *H. D. Roome*), for the Crown. There was no misdirection which will justify the quashing of the appellant's conviction. The *onus* is on the appellant to shew that the alleged misdirection resulted in a substantial miscarriage of justice. *Cohen and Bateman*, 2 Cr. App. R. 197, 1909; *Stoddart*, 2 Cr. App. R. at p. 245, 1909; *Wann*, 7 Cr. App. R. 135, 1912. That *onus* he has failed to discharge. The appellant has complained that the judge told the jury that his (the appellant's) counsel made certain statements during his speech to the jury which he (the appellant) denies that counsel did make. In a long case it is most desirable that a shorthand note should be taken of the speeches of counsel.

[DARLING J.: By an Additional Rule to the Criminal Appeal Rules, dated March 27th, 1908, power is given to a trial judge to order shorthand notes to be taken of the speeches of counsel. If counsel knows that a case is going to be long it is well for him to draw the attention of the judge to the Rule, and, if the judge thinks fit, he will act on it.]

DARLING J.: The Court having now heard the argument affirms the conviction. Judgment setting out the reasons for that decision will be delivered on a later date, to which we will postpone our consideration of the question of the sentences.

March 25th.—The appellant, *Bliss Hill*, appeared in person, and argued in support of his appeal against sentence.

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DARLING J.: We will deliver the considered judgment on the whole of this case on Wednesday next (March 27th).

G. B.

March 27th.—Darling J. read a judgment in which only the following passages are necessary for the purpose of this report:—

The appellant was indicted, together with Mary Broadhurst and Theresa Meanley, for having on 11th April, 1916, uttered a forged will of Charles Jeffries—knowing it to be forged—with intent to defraud. They were also indicted, in other counts, with having between April 15th and November 16th conspired together to utter that forged will in order to prevent the due course of law and justice in the probate suit in which they were the plaintiffs. That the will is a forgery is beyond dispute. The defendants in fact uttered it when trying to obtain probate of it, and by putting it forward as genuine in the course of proceedings in the Probate Court, and afterwards in the Court of Appeal. All the defendants were convicted, Bliss Hill appeals against his conviction and sentence, which is one of three years' penal servitude.

This appellant put before the Court several grounds on which he contended that the conviction should be quashed. First, he complains that Avory J. at the trial misdirected the jury "in directing them to consider the evidence in the case as affecting him apart from that of his character and reputation, and not directing them to have regard to his proved character for life-long rectitude and integrity, as affecting the credibility of his evidence and the probability of his knowingly doing anything wrong, also not directing them, when considering the probabilities of the case, to have regard to the especially ruinous consequences to him as a solicitor of knowingly making himself a party to any offence." So far as the above objections relate to the manner in which the learned judge directed the jury concerning the evidence of appellant's good character they raise a question of law, strictly speaking. Were there a misdirection in regard to that question of law, this Court would order the conviction to be set aside. Concerning the evidence of Hill's character the learned judge said this: "Now, he is a man who for forty years or more has carried on practice as a solicitor. He has received in this Court a character which is the best that could be given to any man from those who have known him in Wolver-

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hampton, where his office was, and from those who knew him at Colwyn Bay, where he lived. If the evidence leaves you in doubt whether this charge is brought home to him you are entitled to take into consideration the character which he has hitherto borne. You are entitled to take it into consideration in the sense that you may say to yourselves, it is unlikely that a man of such a character, of such a reputation, would commit such an offence. You are also entitled to take into account in his favour the fact that so far as can be suggested he had nothing to gain by making himself a party to any fraud upon the Court except his costs. But, on the other hand, if the evidence leaves you in no doubt—if it satisfies you that the defendant, Hill, was a party to this uttering of a forged will, or to this fraud upon the Court, to a conspiracy to prevent the course of justice—if the evidence satisfies you of that beyond any reasonable doubt, then his previous good character which he may have borne affords no answer."

It was argued that the above direction amounts to misdirection in law—and for this contention reliance was placed upon the following passage in Russell on Crimes (7th edit.), 2119, with which the appellant was furnished: "It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime which he is called upon to answer." The fault of the learned judge at the trial is said to exist in this passage in the summing up: "If the evidence leaves you in doubt whether this charge is brought home to him,

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you are entitled to take into consideration the character which he has hitherto borne." Had the learned judge stopped there it may be that his direction would have been insufficient—for where the final result of the deliberations of a jury is reasonable doubt they are always bound to acquit the defendant. But in this case the learned judge cannot be said to have contravened the rule—even as developed by Russell—for the good character of Hill was "submitted to the jury together with the other facts and circumstances of the case." For a little later in his summing up the learned judge used these words, "The prosecution must establish to your satisfaction his guilt. If they leave you in doubt whether he was guilty or not he is entitled to be acquitted. And, as I have already said, the whole question so far as he is concerned is this: upon the evidence *as a whole* is it reasonably possible that he may have been deceived by these two women into the belief, either that the will was in fact genuine, or into a state of mind which left him in doubt whether it was genuine or not?"

The history of the admission of evidence of good character, as given in Stephen's History of the Criminal Law of England, shews that such evidence does not stand on precisely the same plane as that concerning the relevant facts going to prove or disprove the issue. That the view of this kind of evidence taken by the learned judge at the trial is correct is made abundantly clear by the following statement by Lord Ellenborough C. J. in *R.* v. *Davison*, 31 State Trials, 1808, p. 216:—

"This is the whole of the evidence on the substance of the charge. What follows is evidence, highly important if the case be at all doubtful, if it hangs in even scales. If you do not know which way to decide, character should have an effect; but it is otherwise in cases which are clear. . . . As I have already stated to you, if the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order to let character have its operation, the case must be reduced to that situation." In *R.* v. *Frost*, 4 State Trials, N. S. 85 (1839), more than thirty years later. Tindal C. J.—two other judges, Parke B. and Williams J., being present—thus expresses himself on evidence of good character called on behalf of defendant: "If the evidence which goes to the fact is sufficiently strong to convince you that the act of criminality which is imputed to him was actually committed, then it is no more than weighing

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probability against fact. If the scales are hanging even, and you feel a doubt whether the party is guilty or not of the act charged against him, *then* undoubtedly you will give him the full benefit of such testimony of general character which he may have earned by his previous conduct in life. Gentlemen, you are to weigh it not as direct evidence in the case—not as positive evidence contradicting any that has been brought on the other side—but as testimony, probably, to induce you to doubt whether the other evidence is correct, and not to discard that evidence if you think that it is so." Here we find ample—and practically verbal—authority for the direction given to the jury by Avory J. in this regard. There is no doubt that, on the whole, the summing up was not favourable to the defendant, and it is not faultless. But it is to be remembered that it was delivered at the end of an investigation which had lasted ten days, that the jury had themselves heard all the evidence, and that very able and experienced counsel had addressed them fully on defendant's behalf.

If there has been misdirection on law, the *onus* is upon the Crown to shew that on a proper direction the result would have been the same. If the Crown fails to shew this the conviction must be quashed.

If there has merely been a misstatement of or a failure to state facts, there may have been a miscarriage of justice, and the *onus* is on the appellant to shew that on a reasonable view of the facts and with a proper direction thereon, the result might well have been different. If the appellant fails to shew this the conviction must stand.

For this proposition it is enough to refer to the cases already decided in this Court, especially *R.* v. *Cohen and Bateman,* 2 Cr. App. R. p. 207, and *R.* v. *Stoddart,* 2 Cr. App. R. pp. 245—6.

Suffice it to say that the Court is not satisfied that any misdirection, non-direction, comment, or omission of the learned judge entitles the appellant to have this conviction quashed—and it is therefore affirmed.

Applications and appeal dismissed.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SHEARMAN.

WILLIAM YARDLEY.

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Sentence mitigated in view of favourable facts not known to the judge at the trial.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 11th March, 1918, at the Warwick Assizes, before A. T. Lawrence J., of larceny, and was sentenced to three years' penal servitude.

Maddocks for the appellant, who was present. The appellant pleaded guilty to breaking and entering Army Stores at Warwick, and stealing articles of jewellery which were alleged to have been the property of soldiers who had fallen in action, and which were waiting identification. He had been in the Army, and left some five years before the War. In the interval he worked well and honestly. He rejoined on the outbreak of war, was passed for home service, and was employed as an orderly at the time of the offence. He was tempted by the opportunity he had of taking the articles, and the temptation was made the greater by a letter which he received from his wife saying that she was short of money. She had five children, of whom the eldest was sixteen years old, and she was about to be confined. The total value of the stolen goods was said to be £50, but I am instructed that he only received £2 for them. He said that he did not know that they belonged to the relatives of men who had been killed in action; I think the remark was an unfortunate one, and the judge said that he did not believe him. The appellant had been convicted of stealing a garden fork in 1900, and in 1905 he was sentenced to three months' imprisonment for stealing an overmantel. No inquiry had been made regarding his character since

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1905, but I have here original testimonials speaking in high terms of his character from employers for whom he worked.

The Crown was not represented.

DARLING J.: In this case the prosecution is not represented, but the Director of Public Prosecutions has informed us that he has nothing to lay before the Court, and therefore did not think it necessary to go to the expense of instructing counsel. We have heard counsel for the appellant on matters which were not brought to the notice of A. T. Lawrence J., the judge before whom the appellant pleaded guilty. He was charged with stealing a variety of articles which belonged to the relatives of soldiers who had been killed in action, and which had been returned for the purpose of being handed over to the relatives. The appellant must have known what they were, and he does not pretend to say what he thought they were. No one could believe that he did not know. He was asked by his wife for money, and he thereupon stole a considerable number of articles, which he sold in public-houses. In sentencing him Lawrence J. said: "You have pleaded guilty to the meanest crime which has ever been brought before me. Your previous character is bad enough, but your present character is atrocious." Everyone who knows my brother Lawrence would know that he would be peculiarly indignant at what was a low and mean crime. He was naturally and properly indignant, but he seems to have been under a slight misapprehension about the appellant's previous character. It is true he was convicted in 1903, but not of a serious offence, and in 1905 he was convicted of stealing an overmantel. He has twice been convicted of larceny, but Lawrence J. did not know that since 1905 he has not only not been convicted, but in fact had been earning an honest living. Characters have been read to us by Mr. Maddocks, which were not before the judge. He might have remained an honest man if he had not been put in charge of the store in which were things which might never have been claimed, and some of which may have had no owner, for it is not everyone who leaves relatives. It remains a very mean crime, and we are not surprised that the judge passed the sentence which he did. If he were here to-day and knew of the appellant's career between 1905 and 1918 we do not think he would have taken quite the same view. The crime

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remains a peculiarly mean one, and must be punished as such, but the decision of the Court is that the sentence shall be reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

Solicitor for Appellant—*J. Hall-Wright*, Birmingham.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE McCARDIE AND MR. JUSTICE SALTER.

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The discretion of a judge at the trial whether defendants jointly indicted should be tried separately must be judicially exercised. The head-note to Lee and Parkes, *above, p. 39, is too widely stated.*

The neglect by a father of a child living with him may be so great, even though he provides the funds for the child's maintenance, as to amount to murder, if through neglect the child dies. A woman living with a man in such circumstances, if she has accepted charge of the child, may also be guilty of murder.

These were appeals against conviction on matters of law. Appellants were convicted, on the 18th March, 1918, at the Leeds Assizes, before Roche J., of murder, and were sentenced to death.

R. A. Bateman for appellant Gibbins (under s. 10 of the Criminal Appeal Act), who was not present. The appellants were convicted of the murder of Gibbins's daughter Nelly, a girl of seven, it being alleged that she died of starvation as the result of a long course of cruelty and neglect at the hands of both appellants. Before the trial opened application was made on behalf of both prisoners that they should be tried separately; this application was refused, and I submit that Gibbins's trial was prejudiced thereby, especially as this was a case of mutual recrimination, each prisoner seeking to put the blame on the other: *Lee and Parkes*, 13 Cr. App. R. 39, 1917.

[DARLING J.: The head-note there goes beyond the decision of the Court, which laid down no rule of general application.]

Moreover, evidence of statements and conversations was given

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which were admissible against one appellant and not against the other.

[DARLING J.: The matter is one for the discretion of the judge and unless the discretion is not exercised judicially this Court will not interfere: *Yousry,* 11 Cr. App. R. 13, 1914.]

The evidence was not sufficient to support a verdict of murder; it should have been manslaughter only. Gibbins was in regular employment earning good wages, and he gave evidence that he gave the whole of them to Proctor. It was his duty to provide the money; it was hers to provide food. The child was not hers, but she was living with Gibbins, and no doubt had assumed some duty towards the deceased child, which might justify a verdict of murder against her; see *Saunders,* 7 C. & P. 277, 1836. Gibbins was out at work all day, and was told that the child was all right. The prosecution must prove that he knew of the child's condition, and, to justify a verdict of murder, that he took an active part. On the evidence the verdict should have been guilty of manslaughter: *Bubb and Hook,* 4 Cox C. C. 457, 1850. No intent to kill was proved.

[MCCARDIE J. referred to *Conde,* 10 Cox C. C. 547, 1867.]

A photograph of the deceased child was put in evidence which was taken after the child had been buried for a month. It was said that there had been no decomposition, but the evidence was most prejudicial to the prisoners, and therefore should have been excluded: *Christie,* 1914, A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 24 Cox C. C. 249; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. App. R. 141.

F. J. O. Coddington for appellant Proctor (under s. 10 of the Criminal Appeal Act), who was present. A separate trial was especially necessary in the interests of Proctor, and the refusal to grant a separate trial amounted to a miscarriage of justice.

The judge misdirected the jury on the distinction between murder and manslaughter. There must be a positive withholding of food which is available to found a verdict of murder here. If money is given and not food, a verdict of murder would only be

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justified where the money is ear-marked for the particular person. The legal obligation to maintain is on the husband, and therefore Proctor could not be convicted of manslaughter: *Forsyth*, Russell on Crimes, 7th ed., 671, in 1899. She was *de facto* the wife of Gibbins, and in such cases the wife has been held to be the servant of the husband. Unless she withheld food actually supplied she cannot be convicted of manslaughter, and probably not of murder: *Squire*, 1 Russ. Cr., 7th ed., 668, 670, in 1799; *Saunders*, above; *Instan*, 1893, 1 Q. B. 450; 62 L. J. M. C. 86; 5 R. 248; 68 L. T. 420; 41 W. R. 368; 17 Cox C. C. 602; 57 J. P. 282; C. C. R.; *Lee and Parkes*, above.

Shortt, K.C. and *Sir Robert Aske* for the Crown, were not called upon.

DARLING J.: The two appellants were indicted and tried together for the wilful murder of Nelly Gibbins, the daughter of Gibbins. The facts were that Gibbins's wife had left him, and he was living in adultery with Proctor. There were several children, one of whom was the child of Proctor, in the house. He earned good wages, which he brought home and gave to Proctor to maintain the house and those in it. There is no evidence that there was not enough to keep them all in health. And all were looked after except one, namely Nelly, who was starved to death. Her organs were healthy, and there was no reason why she should have died if she had been supplied with food. She was kept upstairs apart from the others, and there was evidence that Proctor hated her and cursed her, from which the jury could infer that she had a very strong interest in her death.

When they were put on their trial both counsel applied that the prisoners should be tried separately. Thereupon Roche J. said, in answer to the suggestion that it would be impossible to separate the evidence against the two, "I have no doubt it will be done, and can be done without any detriment." The trial proceeded after that. The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially. If he has done so this Court will not interfere, but that is subject to this qualification. If it appeared to this Court that a miscarriage of justice had resulted

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from the prisoners being tried together it would quash the conviction. Here it is clear that Roche J. exercised his discretion; he separated the defences carefully, pointing out what was evidence against one prisoner, and not against the other. It is not enough to say that counsel could have defended them more easily if they had been tried separately. There is no ground for thinking that there was any miscarriage of justice. There may have been many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together. There is no ground for thinking that either of them was improperly prejudiced by their being tried together.

Several small criticisms have been made which it is not necessary to consider, since there is nothing to lead us to suppose that the verdict was arrived at wrongly in consequence of these matters. There remains the question whether the judge misdirected the jury on a point of law. Had he done so on a really material point we should quash the conviction, unless it came within the proviso to s. 4 (1). But the misdirection here complained of is on a crucial matter, where he told the jury what they must find in order to convict either prisoner of murder. He said, "The charge against the prisoners is, in the first place, that they killed this child Nelly, or caused her death, by malice aforethought. That means they intended she should die and acted so as to produce that result." If that is a misdirection it is one in favour of the prisoners. "In dealing with that you will of course remember, and it is my duty to tell you, that very rarely will people say when they do such a thing that they intended to produce such a result. Sometimes they do say that they killed a person and intended to do so, but rarely, and as a rule you have to judge of persons' intentions from their acts, they being reasonable persons, and there is no suggestion here at all that either of these prisoners was in any way insane, being reasonable persons you have to deal with, you must judge of them as understanding the nature of the act they are doing, and if you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury, as the result of which she died, it is not necessary for you to find that she intended or he intended to kill the child

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then and there. It is enough if you find that he or she intended to set up such a set of facts by withholding food or anything as would in the ordinary course of nature lead gradually but surely to her death." In our opinion that direction amply fulfils the conditions which a judge should observe in directing the jury in such a case as this.

There are other places where this is alluded to; for instance, where the judge said: "As she could see it," that is Nelly's condition, "and as no steps were taken by her it is consistent, and only consistent—that is the submission—with the intention to work most grievous bodily harm to this child, and to bring about her death. If you think so, gentlemen, serious as it is, it will be your duty to find a verdict of murder." Now for this there is ample authority. It is sufficient to refer to *Bubb and Hook*, where Williams J. said: "It remains for me to explain to what extent she is responsible. If the omission or neglect to perform the duty was malicious, then the indictment would be supported, and the crime of murder would be made out against the prisoner; but if the omission or neglect were simply culpable, but not arising from a malicious motive on the part of the prisoner, then, though it would be your duty to find her guilty, it should be of manslaughter only. And here it becomes necessary to explain what is meant by the expression malicious, which is thus used. If the omission to provide necessary food or raiment was accompanied with an intention to cause the death of the child, or to cause some serious bodily injury to it, then it would be malicious in the sense imputed by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death." The word used is "contemplated," but what has to be proved is an intention to do grievous bodily injury. In our opinion the judge left the question correctly to the jury, and there is no ground for interfering with the convictions for those reasons.

It has been said that there ought not to have been a finding of guilty of murder against Gibbins. The Court agrees that the evidence was less against Gibbins than Proctor, Gibbins gave her money, and as far as we can see it was sufficient to provide for the wants of themselves and all the children. But he lived in the house and the child was his own, a little girl of seven, and

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he grossly neglected the child. He must have known what her condition was if he saw her, for she was little more than a skeleton. He is in this dilemma; if he did not see her the jury might well infer that he did not care if she died; if he did he must have known what was going on. The question is whether there was evidence that he so conducted himself as to shew that he desired that grievous bodily injury should be done to the child. He cannot pretend that he shewed any solicitude for her. He knew that Proctor hated her, knew that she was ill and that no doctor had been called in, and the jury may have come to the conclusion that he was so infatuated with Proctor, and so afraid of offending her, that he preferred that the child should starve to death rather than that he should be exposed to any injury or unpleasantness from Proctor. It is unnecessary to say more than that there was evidence that Gibbins did desire that grievous bodily harm should be done to the child; he did not interfere in what was being done, and he comes within the definition which I have read, and is therefore guilty of murder.

The case of Proctor is plainer. She had charge of the child. She was under no obligation to do so or to live with Gibbins, but she did so, and receiving money, as it is admitted she did, for the purpose of supplying food, her duty was to see that the child was properly fed and looked after, and to see that she had medical attention if necessary. We agree with what Lord Coleridge C.J. said in *Instan*, above: "There is no case directly in point, but it would be a slur upon, and a discredit to the administration of, justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her; that legal duty the prisoner has wilfully and deliberately left unperformed, with the consequence that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty." Here Proctor took upon herself the moral obligation of looking after the children; she was *de facto*, though not *de jure*, the wife of Gibbins and had excluded the child's own mother. She neglected the child undoubtedly, and the evidence shews that as a result the child died. So a verdict of manslaughter at least was inevitable.

But it is necessary to go further and see whether it was murder.

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The evidence is that she had plenty of money; that she kept the child upstairs insufficiently supplied with food; that she hated the child and hit her. There is also evidence that when the child died of starvation both appellants took part in hiding the body and preventing the death from being known. They concocted a story that she had been sent away and was still alive. There is evidence that Proctor told Gibbins to bury the child out of sight, and that he did so in the brickyard where he worked. The jury came to the conclusion that she had done more than wickedly neglect the child; she had deliberately withheld food from it, and therefore we come to the conclusion that there was evidence which justified the jury in returning a verdict against her, not merely of manslaughter, but of murder. The appeals are therefore dismissed.

Appeals dismissed.

A. L. B. T.

THOMAS RICKARD.

Where a conviction rests mainly on the evidence of handwriting, which the Court thinks was not satisfactorily discussed before the jury, it will quash the conviction.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted, on the 28th February, 1918, at the Lewes Assizes, before Lord Coleridge J., of forgery, and was sentenced to nine months' imprisonment with hard labour.

Skinner for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is a regimental sergeant-major in the Canadian Force. He was in a military hospital at Eastbourne, where the prosecutor, Stanley Busby, a private in the Canadian Infantry, occupied the next bed. On the 9th January Busby's father received a telegram sent off from Eastbourne about 9.15 a.m. asking for £9 and purporting to come from his son. He sent the money by telegram, and on the same afternoon the order was cashed at the Eastbourne Post Office by a man whom the official could not identify, but whom she believed to have been in uniform. A receipt for the

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£9 was signed by him. The appellant was indicted for forging this receipt, and for obtaining £9 under and by virtue of a forged receipt. On the 14th January the appellant was discharged from the hospital, and on the 18th January he wrote a friendly letter to Busby.

At the trial evidence was given first, of opportunity; and it was shewn that the appellant knew what Busby's father's address was, and that Busby had told him that he had sent a remittance to his father; also that the appellant left the hospital at 8 a.m. on the 9th January. He denied this, and said he did not leave till 10 a.m. If there was evidence of opportunity it was not of exclusive opportunity. Secondly, evidence of handwriting was given. Busby said of the receipt that in his opinion it was in the appellant's handwriting, but he was not an expert, and it was not suggested that he had ever seen him write. Inspector Wells also gave evidence to the same effect, but in cross-examination it became clear that he was not an expert; he said, however, that he had seen the appellant write once; this was after his arrest, and the fact that he had acquired evidence *ad hoc* for the purpose of the case does not make his evidence admissible: *FitzWalter Peerage Claim*, 10 Cl. & F. 193, 1843. In *Crouch*, 4 Cox C. C. 163, 1850, evidence given in very similar circumstances was held inadmissible.

[McCARDIE J.: *Silverlock*, 1894, 2 Q. B. 766; 63 L. J. M. C. 233; 10 R. 431; 43 W. R. 14; 58 J. P. 788; C. C. R., is also in your favour.]

The judge allowed the jury to compare the handwriting or the receipt with that of the letter written by the appellant to Busby. He should not have done so in the absence of any evidence by an expert: *Harvey*, 11 Cox C. C. 546, 1869. Evidence of handwriting is precarious and dangerous: *Eagleton* v. *Kingston*, 8 Ves. 438, 1803; *Doe* v. *Suckermore*, 5 A. & E. 703; 2 Nev. & P. 16, 1836. No evidence was given of any particular similarities. (He was stopped by the Court.)

Raven for the Crown. Evidence was given that the appellant was aware of facts which enabled him to commit the fraud; it was impossible to prove that no one else knew them; it

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was left to the appellant to prove that some other person knew them if he could do so. The jury heard the appellant cross-examined, and on the evidence was entitled to convict.

SALTER J.: The appellant and Stanley Busby were occupants of the same ward of a military hospital, and Busby gave evidence of a conversation he had with the appellant, in the course of which he had shewn him his pay book, which contained the name and address of his father, and also shewed that he had recently received sums for military pay. He also informed the appellant that he had recently sent £20 to his father. Shortly afterwards, on the 9th January, a soldier in uniform despatched at about 9.15 a.m. a telegram to Busby's father asking that £9 might be remitted to him at once. The father sent the money, and a soldier presented a telegraphic money order and signed a receipt for the money in the name of Stanley Busby. On the 14th January the appellant left the hospital, and on the 18th January wrote a friendly letter to Busby. Busby had in the meantime discovered the fraud and handed the letter to the police, who compared the letter and envelope with the forged telegram and receipt, and came to the conclusion that all four were in the same handwriting. The appellant was then arrested.

At the trial Busby gave evidence that at about 8 a.m. on the 9th January he saw the appellant leave the ward, and he also expressed the opinion that the telegram and letter were in the same handwriting. A police officer also said the same thing; he said that he had no expert knowledge, but that he had studied the writings for the purposes of this case. So there was evidence of opportunity to commit the crime, no evidence of want of means, but the appellant was not identified as the person who sent the telegram. It is plain that many other persons had access to the pay book, so there was no evidence of exclusive opportunity in the appellant to commit the fraud.

It is clear therefore that the result attended mainly on the question of handwriting. That is governed by Denman's Act (28 & 29 Vict. c. 18), s. 8, which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses: and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of

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the genuineness or otherwise of the writing in dispute." In *Crouch* it was proposed on a question of handwriting to ask the opinion of a police officer who had no knowledge of the subject, except that acquired in the course of the case. Maule J. rejected the evidence, saying, "Knowledge so obtained, that is to say, for such a specific purpose, and under such a bias, is not such as to make a man admissible as a *quasi-expert* witness. He does not come to speak as a fact, but as a witness of skill, to use his judgment upon a particular question. The only means he has had of acquiring a capability to form such a judgment are not such as to make him a competent witness in that particular."

That case does not decide what degree of preparation is necessary to constitute an expert, but it does decide that a person is not entitled to give such evidence if his only knowledge on the subject is that acquired in the course of the case. That was the position of the police officer, and the position of Busby is less satisfactory. Therefore no expert evidence at all was given in the case. This Court does not decide that expert evidence in such cases is necessary, and the observations of Blackburn J. in *Harvey* do not so decide, but it is clear from the nature of things that to leave a question of handwriting to a jury without assistance is a somewhat dangerous course. Here the similarities and dissimilarities were not discussed by counsel or witnesses, nor by the judge. The documents were handed to the jury for them to form what opinion they could from them. This Court has before now examined documents in such a case, and has done so here. If we found very striking similarities we might come to a different conclusion. But though there are some similarities, there are more striking dissimilarities, and the similarities are not sufficient to enable us to say that we must support the conviction. The Criminal Appeal Act, s. 4 (1), provides that this Court shall allow an appeal if it thinks that the verdict of the jury cannot be supported having regard to the evidence. On the whole, having regard to the evidence, and to the immense importance of not running the risk of convicting an innocent person, we feel that the safer course here will be to quash the conviction.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE AND MR. JUSTICE SHEARMAN.

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ALFRED ALEXANDER GOULD..

Hard labour may be imposed for a common law misdemeanour by virtue of s. 16 (1) of 4 & 5 Geo. 5, c. 58 (a).

Appeal against conviction and application for leave to appeal against sentence.

The appellant was convicted, on March 12th, 1918, before Mr. Justice Avory, at the Central Criminal Court, of conspiracy to defeat the provisions of the Military Service Acts by enabling a person liable to military service, wholly or partially to escape from that liability, and was sentenced to sixteen months' imprisonment with hard labour. He now appealed against his conviction on law, and applied for leave to appeal against sentence.

The only point which calls for report was the following:—

Abinger (*Anthony Young* with him) for the appellant, who was present. The sentence passed on the appellant was sixteen months' imprisonment *with hard labour*. It is clear that, under s. 29 of the Criminal Procedure Act, 1851, it was not open to the Court to administer a sentence of hard labour for an offence such as that of which the appellant was found guilty. The sentence could only be justified under s. 16 (1) of the Criminal Justice Administration Act, 1914, which provides that "where a person convicted by or before any Court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the Court, be either with or without hard

(a) See *E. Saunders*, 12 Cr. A. R. 61, 1916.

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labour, notwithstanding that the offence is an offence at common law, or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour." Those words form the second paragraph of a sub-section, the first paragraph of which provides that imprisonment for non-payment of any sum adjudged to be paid shall be without hard labour. It is inconceivable that so revolutionary a change in the law as the second paragraph is said to contain could have been intended to be effected in so obscure a way, and it is submitted that the paragraph cannot be read in such a way as to justify the appellant being sentenced to hard labour.

[DARLING J. referred to *Barlow*, 12 Cr. App. R. 185, 1916.]

Travers Humphreys (*Percival Clarke* with him) for the Crown, was not called on to argue on this point.

DARLING J. said that of all the points taken on behalf of the appellant only one called for any comment, and that that point failed. He concluded: With regard to the sentence, the Court is of opinion that the Criminal Justice Administration Act, 1914, entirely altered the law in a great many respects and that, in these cases, as in very many others, it is now possible to inflict a sentence of imprisonment *with hard labour*, although such a sentence could not have been imposed before the passing of the Statute. This appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Edgar & Co.*

G. B.

The Court (Darling, A. T. Lawrence and Avory JJ.) also sat on May 6th.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE A. T. LAWRENCE AND MR. JUSTICE AVORY.

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FRANK HARRY MORTIMER.

There can be no standardisation of sentences for bigamy. Sentence mitigated to save forfeiture.

The applicant was convicted, on April 23rd, 1918, before the Recorder, at the Central Criminal Court, of bigamy, and was sentenced to twelve months' imprisonment with hard labour. He now applied for leave to appeal against his sentence.

J. P. Valetta for the applicant. It is submitted that the sentence should be reduced. The applicant served in the Army from 1901 to 1913, and was discharged with an exemplary character. His conduct with regard to the woman with whom he committed bigamy was perfectly honourable except that he deceived her by telling her that he was a single man. The Recorder, in passing sentence, seemed to think that he was bound to pass a severe sentence on the applicant in view of the remarks which have fallen from judges regarding the need of dealing sternly with an offence which has become frequent during the war (*a*). From *Jowsey*, 11 Cr. App. R. 241, 1915, it would appear that the Court can deal with the question of the alteration or reduction of this sentence on this application, though no counsel appears on the other side.

A. T. LAWRENCE J.: There can be no standard sentence in these cases, every one of which must be dealt with on its own facts. Here the applicant has performed exemplary service in the Army. To prevent the forfeiture of his pension, which is the reward for

(*a*) See p. 122, above.

his past services, the Court has come to the conclusion that the sentence of twelve months' imprisonment with hard labour should be replaced by a sentence of imprisonment of the same duration but without the hard labour (*b*).

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LAWRENCE J.

Sentence reduced.

Solicitors for Applicant—*Pierron & Morley*.

G. B.

JOHN WALTER KNOWLES.

Under 7 Geo. 5, c. 4. s. 1 (2), when an indictment fulfils the requirements of that sub-section, additional counts may be added before *presentment without leave.*

Appeal against conviction.

The appellant was convicted, on April 9th, 1918, before the Chairman, at the Staffordshire Quarter Sessions, of receiving stolen goods, and was sentenced to eighteen months' imprisonment with hard labour.

The only point which calls for report is that dealt with below.

Vachell, K.C., and *Arthur Ward* for the appellant, who was present.

Graham Milward for the prosecution: he incidentally remarked that at the trial he had applied for leave to add two further counts to the indictment, but that the Chairman had refused him permission to do so.

AVORY J.: No leave would have been necessary if you had added the further counts before the indictment was presented. There has been much misunderstanding with regard to sub-s. 2 of s. 1 of the Grand Juries Suspension Act, 1917, which deals with this matter. The section provides: "In any case where a

(*b*) By virtue of s. 2 of 33 & 34 Vict. c. 23 (the Forfeiture Act, 1870), a conviction for felony followed by a sentence of any term of hard labour or of imprisonment for more than twelve months causes a forfeiture of pension.

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person has been committed for trial, or where the consent or direction in writing of a judge of the High Court or of the Attorney-General or Solicitor-General for the presentment of an indictment against any person has been given, but in no other case, an indictment against that person may be presented in the appropriate court without having been found by a grand jury, but in other respects as heretofore; and where an indictment is so presented it shall be proceeded with in like manner as if a true bill had been found and presented in the court by a grand jury, and the statute and common law relating to such proceedings shall apply accordingly: Provided that where an indictment is so authorised to be presented in any court it shall be lawful for that court to authorise the addition of other counts to the indictment or the presentment in the court of any further indictment against the same person, if such counts or indictment are in the opinion of that court founded on facts or evidence disclosed in any examination or deposition taken before a justice of the peace in the presence of the accused." The words "but in other respects as heretofore" mean what they say, namely, that except for the suspension of the grand jury the procedure shall remain unaltered, and the insertion without the leave of the court of additional counts in an indictment before it is presented is thereby authorised provided that they could lawfully be added before the Act. The very object of the words "but in other respects as heretofore" was to preserve the right of adding such additional counts to the indictment before presentment without any leave if, in the opinion of those responsible for the prosecution, it was necessary to do so. The proviso to the sub-section was intended to deal with cases where, after its presentment, it was found to be necessary to add further counts to the indictment or a further indictment founded on facts disclosed in the depositions.

Appeal dismissed.

Solicitors for Appellant—*Murr, Rusby and Archer* for *Sharpe and Darby,* West Bromwich; for Respondent, *F. Chapman,* Smethwick.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

JOSEPH REGINALD BENTOTE.

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16 *May.*

Proviso to s. 4 of the Criminal Appeal Act applied when there was no direction on the intent to defraud.

The appellant was convicted, on April 24th, 1918, before the Chairman, at the London Sessions, of obtaining on October 18th, 1917, banker's cheques for £25 and £5 in cash by false pretences from Albert William Harvey, with intent to defraud, and of obtaining on October 31st, 1917, banker's cheques for £5 and £25 in money by false pretences from the same person with intent to defraud. and was sentenced to nine months' imprisonment in the second division.

Wickham for the appellant, who was present. There was no proper direction on the question of intent. The jury were never told by the Chairman that they must find that the appellant had an intent to defraud. Avory J. said in *Ferguson's Case*, 1913, 9 Cr. App. R. 113, at p. 115: "There are cases where it is impossible that the money could be obtained unless there was an intent to defraud: it may be inferred from the circumstances of the case. But this case is not one of them." There the conviction was quashed. Here thirty pounds were lent, it was alleged, on the faith that appellant was owed by certain public bodies specifically named between four and five hundred pounds for the supply of boots. Appellant's evidence was that he never mentioned one of those bodies, but he did say that he was in communication with other public bodies and produced invoices to that effect. All the learned Chairman left to the jury was, "The question is which of these two stories do you believe?" This is not enough.

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In *Badash*, 13 Cr. App. R. at p. 20, 1917, Darling J. said: "It will not do to tell the jury that if they do not believe the prisoner they must convict him, because that leaves out of account the question of the burden of proof." It is submitted that the present case is also not a case in which an intent to defraud can be inferred from the facts, and the appellant was therefore wrongly convicted.

Moyses for the Crown was not called on.

SHEARMAN J.: It was objected by counsel for the appellant that the learned Chairman did not direct the jury on the question of intent to defraud. No doubt, that direction is necessary in every case where a prisoner is charged with false pretences. In *Ferguson's Case*, 1913, 9 Cr. App. R. 113, it was held that on an indictment for obtaining money by false pretences it is essential that the jury should understand that there should be no conviction without an intent to defraud, and unless such intent is clear from the facts, they should be directed on the point. The Court is of opinion in this case that it is regrettable that the learned Chairman did not direct the jury on the question of intent to defraud. But under the proviso of s. 4 of the Court of Criminal Appeal Act, 1907, the Court has power to dismiss the appeal, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, if they consider that no substantial miscarriage of justice has actually occurred. The Court thinks that no miscarriage of justice has been caused by the omission of the Chairman to direct the jury on the question of intent to defraud, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitor for Appellant—*C. H. Appleton.*

T. W. M.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE ATKIN, AND MR. JUSTICE SHEARMAN.

GEORGE SMITH AND FRANK CURRIER.

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The prosecution is not confined under s. 43 (1) (*a*) *of the Larceny Act*, 1916, *to evidence of the bare fact of the finding of "other" stolen property: but may give the same evidence as would be admissible on an indictment in respect of* that *property.*

Proviso to s. 4 *of the Criminal Appeal Act applied despite misdirection.*

Appeals against conviction on law.

The appellants were convicted, on May 4th, 1918, before the Recorder, at the Birmingham Quarter Sessions, of receiving stolen property, and were each sentenced to five years' penal servitude.

Hugo Young, K.C. (*Grierson* with him), for the appellant Smith, who was not present. This conviction should be quashed. At the trial the prosecution, to prove guilty knowledge by the appellant, took advantage of s. 43 (1) (a) of the Larceny Act, 1916, and gave in evidence "the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found . . . . in his possession." Under that section, it is submitted, two facts only may be proved, namely, (1) that such other property had been stolen, and (2) that it had been found in the possession of the accused. Here, however, evidence by a police witness was admitted of a conversation between him and the appellant before and again at the time of the finding of that other property and of the whole of the circumstances surrounding that event. This evidence all tended to incriminate the appellant. The prosecution, in fact, were allowed to act as if the appellant were being tried for receiving that other property and not as if evidence of the finding of that property were being given for the limited purpose

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of proving his guilty knowledge with regard to an offence in connection with totally different goods. Furthermore, when proceeding under s. 43 (1) (a), the proper course is to prove the theft of the property first and then that it was found on the premises of the accused, but here the reverse course was followed, and the prosecution in fact failed to identify as stolen some of the goods which were produced. It is not fair to the accused that the prosecution should be at liberty to produce a large number of goods in Court, to give evidence of their having been found in the possession of the accused, and then to take their chance of some being identified as stolen property. He referred to *Girod*, 70 J. P. 514; 22 T. L. R. 720, 1900.

G. F. L. Bridgman for the appellant Currier (under s. 10 of the Criminal Appeal Act, 1907), who was not present. Evidence of a police witness was admitted at the trial that he charged the appellant Smith, the appellant Currier, and a man named Munn together with being concerned in stealing and receiving property. At the trial Munn pleaded guilty to the theft and was bound over. The witness stated that when Munn was charged he said that he would not have stolen the goods if it had not been for Currier, and repeated a statement that he had previously made, the effect of which was that Currier had asked him to "get" some metal, and had said that he would buy anything he brought. Currier denied this, both at the time and in evidence at the trial, and Munn was not put into the witness-box by the prosecution to give evidence himself. The Recorder in summing up directed the jury that this evidence was "very strong evidence against Currier," and continued:— "You will have to decide for yourselves whether you believe Munn's statement that Currier had persuaded him to steal it and asked him to sell it to him. If you believe that, there can be no doubt about the guilt of Currier; if you don't believe it, then you ought to give Currier the benefit of the doubt." The Recorder practically did not direct the jury on any other aspect of the case against Currier. It is submitted, however, that the evidence of Munn's statement was not evidence against Currier (*Christie*, 1914, A. C. 545; 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 24 Cox, C. C. 249; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. App. R. 141); that the Recorder misdirected the jury

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regarding it, and that, as he dealt with no other matter so far as Currier was concerned, the jury must be assumed to have acted on the misdirection in convicting the appellant, and the conviction should be quashed.

Hurst for the Crown.

DARLING J.: At the trial of the appellant a great deal of evidence was given under s. 43 (1) (a) of the Larceny Act, 1916, that stolen property other than that in respect of which he was charged had been found in his possession. On behalf of the appellant it has been argued that under that section the prosecution may give evidence of the fact of finding other property in the possession of the accused, and of the fact that it had been stolen, but of nothing else; not, for instance, of what was said by the accused when that other stolen property was found or of anything of that kind. Mr. Young admitted that if charges against the appellant of receiving that other property had been before the Court such conversation or other similar facts might properly have been given in evidence, but, he says, in this case there were separate indictments regarding that other property, and different reasoning must be applied. He draws a distinction between what is admissible in evidence when stolen property is the subject of the indictment which is being tried and when it is merely introduced into the trial to prove guilty knowledge, under s. 43. This Court is unable to assent to that. There is nothing in the section to shew that the procedure is to be different from what it would be if the charges of stealing the other goods had been actually before the Court. *Girod* is really authority against Mr. Young's contention, because it is clear from the reports that evidence was given at the trial of conversations which took place at the time of finding of other goods which were introduced into the case to shew guilty knowledge regarding the goods which were the subject of the indictment, and neither the Lord Chief Justice nor any of the other judges took any exception to that evidence, and no one suggested that only the fact of the goods having been stolen and then having been found on the premises of the appellant must be given in evidence and nothing else. *Girod* has been considered in *Ballard*, 12 Cr. App. R. 1, at p. 4, where Lord Reading C.J. said: "If there is evidence that the

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property was stolen it has to be tendered before the defence can give an answer. It is impossible for the Court to say what answer is going to be made. The point was discussed in *Girod*; it is not necessary to examine that case or any case. The Court quashed the conviction because the evidence was admitted without any evidence that the property had been stolen." That disposes of *Girod* as an authority against the prosecution in this case. We do not consider that s. 43 is intended to confine the evidence as has been suggested by Mr. Young. We think that evidence which would be relevant if the other goods were the subject-matter of charges which were before the Court may be given under s. 43. Mr. Young also said that the proper way to prove the facts admissible under the section is to shew that the articles have been stolen before they are produced in Court and before any evidence is given of where they have been found. He complained that that course was not followed in this case, that the goods were brought into court and identified as having been found in Smith's house, and that then evidence was given that they had been stolen, and that in the case of one article, the prosecution failed to prove that it had been stolen. It may be that what Mr. Young suggests is the better course, but it must often be difficult to follow it without producing the articles in court. It does not seem to us to be a matter on which we could quash the conviction. It is purely a matter of procedure, and we cannot say that one course is right and that another is wrong. If the prosecution fail to prove that any article which has been found in the possession of the accused is stolen I can imagine nothing which is more likely to operate favourably in the interests of the accused. For the reasons which have been stated we cannot say that this trial was so misconducted that the conviction must be quashed.

In Currier's case it is of course clear that the evidence of the policeman that Munn had made a statement imputing guilt to Currier was not evidence against Currier. No doubt there is a passage in the summing up which looks as though the Recorder directed the jury that they must choose between Munn's statement and Currier's evidence, and it is to be assumed that he did treat Munn's statement as though it were evidence against Currier. In that he was wrong, and if that were all we should quash the conviction. But if we look further we see that the Recorder

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really dealt with this matter in a way which was too favourable to Currier, because he said that if the jury accepted Currier's evidence as against Munn's statement they should acquit him. There was a great deal of independent evidence against Currier, ample to make out a case against him if the evidence of Munn's statement be excluded altogether, and, therefore, this seems to us to be a proper case to exercise our discretion under the proviso to s. 4 of the Criminal Appeal Act, 1907, and to say that the appeal must be dismissed, as no substantial miscarriage of justice has occurred.

Appeals dismissed.

Solicitors: *James Hall-Wright*, Birmingham, for the appellant Smith; *Philip Baker & Co.*, Birmingham, for the respondents

G. B.

WILLIAM HUNT.

When the Court thinks that it is doubtful whether the jury intended to answer the specific question "Was there an intent to defraud?" in the affirmative, it will quash a conviction.

Appeal against conviction on law.

The appellant was convicted, on May 8th, 1918, before Bray J., at the Leeds Assizes, of obtaining goods and credit by false pretences with intent to defraud, and was sentenced to eighteen months' and twelve months' imprisonment with hard labour, the sentences to be concurrent.

Coddington for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. On Saturday, April 27th, 1918, the appellant called on a Mrs. Hoyle who lived at Wakefield, told her that he had been sent from Kent by the Government to do munition work (which was in fact untrue), and asked her to give him board and lodging. She believed him and in consequence arranged to board and lodge him for 26*s.* a week. She supplied him with tea and supper that night and breakfast the next morning, shortly after which a police-sergeant called and arrested him. In cross-examination she said

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that she took the appellant as a weekly lodger, that he would not have had to pay her until the following Saturday, and that an able-bodied man could get work anywhere at Wakefield as there was a great demand for labour at good wages. In these circumstances it was submitted to the jury that no intent to defraud was proved. The appellant had a week in which to pay, and there seems little doubt that he could easily have got work on the Monday after his arrival in Wakefield, and that he could have earned good wages and been able to meet his debts. An intent to defraud cannot always be inferred from the fact that an untrue statement was made, with knowledge of its falsity, to obtain the goods or credit in question.

He referred to *Brownlow*, 1910, 4 Cr. App. R. 131; 74 J. P. 240; 26 T. L. R. 345; *Ferguson*, 1913, 9 Cr. App. R. 113; *Secombe*, 1917, 12 Cr. App. R. 275; and *Muirhead*, 73 J. P. 31; 53 S. J. 164; 25 T. L. R.; 1 Cr. App. R. 189, 1908.

On the question of intent to defraud the direction of the jury by the judge was insufficient, because he dealt with knowledge of falsity only. Moreover, the way in which the jury gave their verdict of *guilty* (see below) was most unsatisfactory, and it is not clear that they meant to find that the appellant had intended to defraud. The jury would seem to have agreed that the appellant had made false statements, but it was only the foreman who, when pressed and without any further consultation with his fellow jurymen, said that the jury meant that the appellant was guilty of obtaining goods and credit by false pretences. (He was stopped.)

T. B. Perks for the Crown. The foreman made these statements in the hearing of the rest of the jury and none of them protested. They must, therefore, be taken to have assented in finding the appellant guilty of the offences charged against him.

ATKIN J.: The defence raised by the appellant was that he would have had a week in which to pay the money which was due from him to Mrs. Hoyle, that he had reasonable expectation of obtaining work and that he intended to pay his debts out of the wages he would receive. That was a case which he was entitled to submit to the jury. In a charge of this kind one of the principal ingredients of the offence is an intent to defraud by the

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accused. In the judge's summing up to the jury there was no express reference to the point that the appellant might have had a reasonable expectation of having the means of payment and a *bonâ fide* intention to pay and, on that being pointed out at the end of the summing up, the judge said: "Of course, there must be an intention to defraud, but if a man said something which he knows to be untrue to get goods, I do not think you will find much difficulty about the intent to defraud." The jury then considered their verdict for three minutes and then the foreman asked who "set the police on" the appellant. The judge replied that it was immaterial to the charges of fraud, and he could not tell them. The jury then considered "for a moment," according to the shorthand note. We cannot say that there was insufficient direction in this matter, nor that up to this point anything had occurred to vitiate the trial, but then the following dialogue took place:—

THE FOREMAN OF THE JURY: He is guilty of making a false statement.

MR. JUSTICE BRAY: What I asked you was whether he is guilty of obtaining goods by false pretences. Is that what you mean?

THE FOREMAN: Yes.

MR. JUSTICE BRAY: And obtaining credit by false pretences.

THE FOREMAN: Yes, my Lord.

That was said without any careful deliberation, and the statement first made by the foreman was clearly an insufficient verdict.

When the foreman of the jury who represents the jury makes a statement regarding the verdict in the presence of the jury, no one of whom differs from him, their assent would generally be presumed. But in this case, in view of the first statement, "He is guilty of making a false statement," we think that there is very considerable doubt whether the whole jury had considered the question of intent to defraud, and whether the verdict ought to be taken as a final determination by them that the appellant was guilty of obtaining the goods and credit with such an intent. In our view, therefore, the verdict is unsatisfactory, and there is no means of putting it right, and the conviction must therefore be quashed

Conviction quashed.

G. B.

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On an indictment alleging an offence on a specific date the jury is entitled to find Not Guilty on that *date, and "if the indictment covers other dates Guilty," and the Court is thereupon entitled to amend the date in the indictment to "some day in" the month in question. The Court does not take the view that it is "safer to accept the uncorroborated evidence of a young child than that of an adult."*

Appeal against conviction on law.

The appellant was convicted, on May 9th, 1918, before the Deputy-Chairman, at the London Sessions, of indecent assault, and was sentenced on May 10th to nine months' imprisonment with hard labour, and was recommended for deportation.

Sir Ernest Wild, K.C. (*J. A. C. Keeves* with him), for the appellant, who was present. The indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "on March 19th, 1918," and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy-Chairman's summing up the jury retired, and on their return said that they found the appellant "with regard to the date March 19th, *Not Guilty*. If the indictment covers other dates, *Guilty*." They also found him *Not Guilty* of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting "on some day in March" for the words "on March 19th, 1918," and the jury then found the appellant *Guilty* on the amended indictment.

It is submitted that if a man is put on his trial on an indictment which charges him with committing an offence on a specific date and no amendment is made before or during the trial and the jury find that he has not committed the offence on that day they have returned a verdict of Not Guilty, which must be allowed

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to stand. This is especially so where the defence is an *alibi* or, as in this case, a kindred plea. The time at which the amendment was allowed in this case was not "before trial, or at any stage of the trial," as is permitted by s. 5 (1) of the Indictments Act, 1915. A trial is at an end when a verdict of Not Guilty is given (Archbold, 5th ed., p. 220). It is further submitted that the Deputy-Chairman misdirected the jury with regard to the corroboration of the evidence of the child White. That evidence was entirely uncorroborated, and the Deputy-Chairman perfectly properly warned the jury that they must act on it only with the greatest caution. He went on, however, to tell them that it was safer to accept the uncorroborated evidence of a young child than that of an adult. It is submitted that that negatived the whole value of the warning that he had previously given and was a very improper direction.

Percival Clarke for the respondents (upon want of corroboration only). The evidence of Nora White required, in law, no corroboration. The jury were entitled to act upon it if they thought fit, after the warning of the learned Deputy-Chairman—but it was in fact corroborated by the evidence of the defendant himself, and the evidence of Rebecca Barnett tended to shew that the assault was not accidentally but intentionally indecent. The statement on the value of the evidence of a young child was one which the learned Deputy-Chairman in his experience was entitled to make, and in no sense detracted from the warning he had given to the jury.

ATKIN J.: The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him *Not Guilty* and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And althouth the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the

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same law is in the case of an indictment," 2 *Inst.* 318. "*Syer* was indicted of burglary 1 *Augusti*, 31 Eliz. . . . it fell out in evidence that the burglary was done 1 *die Septembris* . . . so as *primo Augusti* there was no burglary done, and thereupon he was found *Not Guilty*, and afterwards he was indicted againe 1 *Septembris*, &c., and it was resolved by Wray and Periam, justices of assise, and by the greatest part of the judges that he ought not to be tried again, for he mought have been found *Guilty* upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day." *Ib.*, and 3 *Inst.* 230: Syer was discharged. Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictments Act, 1915, which give the Court power to amend an indictment "at any stage of a trial" might, in a proper case, permit of an amendment in circumstances similar to those which exist here.

The substantial point made by Sir Ernest Wild was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care. (See *R.* v. *Graham*, 4 Cr. App. R. 218, 1910; *R.* v. *Pitts*, 8 Cr. App. R. 126, 1912; and *R.* v. *Cratchley*, 9 Cr. App. R. 232, 1913.) Those cases sufficiently shew what kind of direction should be given to the jury in cases of this kind, and the question arises whether or not the summing up of the Deputy-Chairman offended against the rules which are there laid down. He told the jury that "The law does not require corroboration. . . . What the law does require is that it must be most carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there

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is no corroboration of the story in such a case as this. . . . . It is for you to say whether or not you are satisfied that that little girl was trying to tell you the truth. I say that you must be very careful before you act without corroboration, but that you are entitled, if you are convinced beyond all reasonable doubt that the little girl is telling the truth, to act on her story even without corroboration." If the summing up had stopped there it could not have been contended that it was open to any objection. The law is stated as the authorities which I have cited laid it down, and the caution to the jury is framed in careful words. But the Deputy-Chairman went on to say in reference to the question of corroboration: "It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people." We think that those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons—sometimes their parents—than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories. There seems to us no reason to distinguish between the amount of corroboration required in the one case and that required in the other. But doubtless the jury looked on this summing up as advice on a matter on which they were quite able to form an opinion. They had heard the beginning of the summing up where they were directed quite accurately, and immediately after the passage I last read the Deputy-

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Chairman said: "You must act with great care in the case of the little girl White. You must act with great care also in the case of Rebecca Barnett." In our view, the repetition of that caution prevented the other parts of the summing up from having the serious effect on the jury they might have had. White's story had very slight corroboration and, indeed, it might be said that, at the end of the case for the prosecution, there was none. But the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined. The appellant in this case stated in evidence that he was in the habit of fondling the little girls and described how he took them up, and the jury might well have refused to accept his story that these things were done innocently. There was evidence to support the verdict, there was no substantial misdirection on the facts or on the law, and the appeal must, therefore, be dismissed. The Court does not see its way to interfere with the sentence which was passed on the appellant.

Appeal dismissed.

Solicitors: *S. Fraulo* for the Appellant; *Wontner & Sons* for the Respondents.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE COLERIDGE.

AUGUSTUS STANLEY WYMAN AND JOHN WYMAN. 1918 *June 24.*

Substantial particulars of misdirection or of other objections to the summing up must always be set out in, or sent to the Registrar of the Court of Criminal Appeal with, the notice of Appeal. If required, the Registrar will ask for further and better particulars.

Appeals against conviction on law and sentence.

The appellants were convicted, on May 30th, 1918, before the Deputy-Chairman, at the County of London Sessions, of receiving stolen property, and were sentenced to twelve months' and six months' imprisonment respectively.

The case does not call for report except on the point dealt with as follows.

The notices of appeal which were filed on behalf of the appellants contained under the heading "Grounds of Appeal or Application" the following statement:—"That the learned Deputy-Chairman misdirected the jury on a point of law, namely, that he misdirected the jury on what corroboration of an accomplice was necessary (the particulars of such misdirection to be given later)." On Saturday, June 22nd, forty-eight hours before the hearing of the appeal, detailed "Particulars of Misdirection" were delivered by the appellants' solicitor.

Holman Gregory, K.C. (*Huntly Jenkins* with him), for the appellants, who were present, argued that there had been misdirection by the Deputy-Chairman, and dealt *seriatim* with the particulars of misdirection referred to.

[DARLING J.: We have often said that it was never intended that any person should take a summing up and pick out small

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immaterial points in it, mere slips of the tongue, and on those grounds complain about the summing up and so attempt to upset a conviction. It has become a bad habit to go through long summings up and to extract from them frivolous and useless points.]

Bryan, for the Crown, was not called on.

LORD COLERIDGE J., after alluding to the alleged misdirection of the Deputy-Chairman on the question of the necessity for corroboration of the chief witness, who was an accomplice, said:— The uncorroborated evidence of an accomplice is undoubtedly admissible in law, but the judge should warn the jury of the danger of convicting on such evidence, and, in his discretion, advise them not to convict upon such evidence, but should point out, as the Deputy-Chairman has done in this case, that it is within their legal province to convict on such evidence if they believe it. If no such warning is given the conviction will be quashed. In *R.* v. *Everest*, 2 Cr. App. R. 130, 1909, it was held that if the only evidence tending to implicate the prisoner is that of an accomplice the judge should tell the jury to acquit. This goes too far. In *R.* v. *Wilson*, 6 Cr. App. R. 128, 1911, where there was abundant caution, it was held that it must not be supposed that corroboration is required amounting to independent evidence implicating the accused, and this view of the law was repeated and confirmed by *R.* v. *Baskerville*, 1916, L. R. 2 K. B. 668. The corroboration must be independent, and must implicate the accused. It is independent if it is outside that of the accomplice. Indirect, circumstantial evidence will be sufficient, if it is independent. It must implicate the accused, that is, it must be evidence to shew, not that the crime has been committed, but that the accused committed it. If, in the absence of corroboration, after the proper caution the jury convict, the Court will not quash the conviction merely on the ground of their having done so, but will review the facts and circumstances. But the Court will quash the conviction, in spite of the warning having been given, if the verdict is unreasonable, or not to be supported on the evidence. The original grounds of appeal stated in the notice of appeal were sufficient, inasmuch as they clearly specified the subject-matter of the alleged misdirection. Voluminous particulars illustrative

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of the original grounds of appeal were furnished to the Court at a late stage. They were evidently the creation or conception of some learned person, who, having the transcript of the shorthand notes of the evidence and of the summing up, directed much ingenuity and industry to picking out from a long and careful summing up a number of small points, most of which are frivolous. On these we are asked to upset the conviction if we can find any possible slight oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence The Court does not deal with matters of this kind. We are here to deal only with substantial points of misdirection We strongly object to this practice which is growing, and we hope that in the future it may be more honoured in the breach than in the observance. It is not fair to learned judges and others who have to sum up in elaborate cases for their remarks to be subjected to the minute scrutiny which has been applied in this case.

At the conclusion of this judgment Darling J. added:—The Court wishes it to be understood that in future substantial particulars of misdirection or of other objections to the summing up must always be set out in the notice of appeal or sent to the Registrar of the Court of Criminal Appeal with the notice of appeal, even if the transcript of the shorthand note of the trial has not then been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If counsel has a genuine grievance regarding a summing up he knows substantially what it is as soon as the summing up is finished, and can certainly specify his general objection when he settles the notice of appeal.

Appeals dismissed.

Solicitor for Appellants: *F. Freke Palmer.*

G. B.

The Court (Darling, Rowlatt and Sankey JJ.) also sat on July 3rd.

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE SHEARMAN, AND MR. JUSTICE SALTER.

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BERNARD ALBERT KUPFERBERG.

The words "without lawful authority" in Defence of the Realm Regulations 45 (e) *and* 48 *may apply to a Government official who acts illegally (as well as to one who has no authority at all).*

For the plea of autrefois acquit *a charge of conspiracy to commit an offence is not the same as that of aiding, &c. in it.*

Appeal against conviction on law.

The appellant was convicted, after a four days' trial, on June 14th, 1918, before Mr. Justice Darling, at the Central Criminal Court, of aiding and abetting offences against the Defence of the Realm Regulations, and was sentenced to three years' penal servitude.

Purchase for the appellant, who was present (under s. 10 of the Criminal Appeal Act, 1907). The appellant was convicted, under Regulations 45 (e) and 48 of the Defence of the Realm Regulations, of aiding and abetting one James Samuel Reardon to apply, "without lawful authority or excuse," to war material a mark authorised to be used to indicate that the material was fit for acceptance by the Government, and, under Regulation 45 (h), of deceiving persons in the employment of the Government about the quality of war material. It was alleged by the prosecution that Reardon applied the Government acceptance mark to exploder containers for shells which, to his knowledge, were defective. It is submitted that the words in Regulation 45 (e), "without lawful authority," apply only to cases where persons who are not authorised by the Government to perform that function place a Government mark on war material, and

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that they do not apply to cases where an authorised person abuses his authority. Reardon was a person properly authorised to place the Government acceptance mark on war material. He was, therefore, wrongly convicted of an offence under Regulation 45 (e), and the appellant could not be convicted of aiding and abetting him. It is further submitted that the appellant was entitled to plead *autrefois acquit* to the charges made against him. Reardon, he and other persons were first tried in March, 1918. The indictment contained nine counts. Counts 1, 2, 3, 6 and 7, contained conspiracy charges which are immaterial. Count 4 charged the prisoners with conspiring to contravene Regulation 45 (e), and count 5 charged them with conspiring to contravene Regulation 45 (h). The appellant was acquitted on all these charges, but the jury disagreed with regard to counts 8 and 9, which contained the charges on which he was retried and convicted in June, and which form the subject of the present appeal. The jury at the first trial, therefore found that the appellant had not concerted with Reardon to commit offences against the Defence of the Realm Regulations, which is the substance of the offence against his conviction for which he now appeals. Moreover, it is submitted that the conduct of the trial by Mr. Justice Darling was prejudicial to the appellant. [He referred to *Barron*, 1914, 2 K. B. 570; 83 L. J. K. B. 786; 78 J. P. 311; 58 S. J. 557; 30 T. L. R. 422; 10 Cr. App. R. 81.]

Roome for the Crown. The Defence of the Realm Regulations are emergency legislation, and must be construed with reasonable latitude. One of the evils provided against by Regulation 45 (e) is certainly the application of Government marks to war material by unauthorised persons, but it also deals with the unauthorised application of such marks by authorised persons. Reardon's only authority was to apply the Government acceptance mark to material which had been properly tested and which he honestly believed to have been passed. With regard to the argument on *autrefois acquit*, the offence of aiding and abetting does not contain the same elements as that of conspiracy, and therefore an acquittal on a charge of the one does not afford protection against a subsequent prosecution on a charge of the other.

Purchase replied.

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A. T. LAWRENCE J.: The Court is of opinion that the first point taken by counsel on behalf of the appellant—namely, that on the construction of Regulation 45 (e) of the Defence of the Realm Regulations—is unsound. We think that the Regulation cannot receive so narrow an interpretation as was contended for. The only authority that Reardon had was to apply the Government acceptance mark to material which he *bonâ fide* believed to comply with the standard required. He had no authority to apply it to any other material. Reasonable latitude must be given in construing these Regulations. They must not be read as if one necessarily excludes all the others, and that disposes of Mr. Purchase's argument that paragraph (h) of Regulation 45 would render paragraph (e) unnecessary if the construction were placed on (e) which the Court now gives it.

Counsel further contended that the appellant was entitled successfully to plead *autrefois acquit* at the second trial, because at the first trial he had been acquitted of certain charges of conspiracy which were framed under the same Regulation as that which formed the basis of the charges made against him at the second trial. That also appears to the Court to be an erroneous contention. A charge of conspiracy is not the same as one of aiding and abetting. It is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be. For a plea of *autrefois acquit* to be maintainable, the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients. The facts which constitute the one must be sufficient to justify a conviction for the other. To prove conspiracy against the appellant, it is necessary that an agreement, express or implied, should be proved to the satisfaction of the jury, but it is quite unnecessary to prove such agreement where the charge is one of aiding and abetting. In the latter case, it is only necessary to show that the appellant appreciated what was going on and did something to further it. The trial was not conducted in any way unfairly to the appellant, and this appeal must therefore be dismissed.

Appeal dismissed.

G. B.

FRANK CHARLES BURNINGHAM.

1918
July 22.

Sentence reduced in view of previous good character.

Appeal against conviction and sentence.

The appellant was convicted, on June 8th, 1918, before the Chairman at the Middlesex Sessions, of larceny on two indictments, and was sentenced to two consecutive sentences of nine months' imprisonment in the second division.

Warburton for the appellant, who was present (under s. 10 of the Criminal Appeal Act, 1907). The conviction should be quashed. There was no evidence of larceny to go to the jury. In any case, the sentences were too severe in view of the fact that the appellant bore the highest possible character.

Roland Oliver for the Crown, was not called on.

A. T. Lawrence J.: The Court is of opinion that there is no ground for interfering with the conviction. The sentences will be reduced, however, to a total of twelve months' imprisonment.

Sentence reduced.

G. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE ROWLATT, AND MR. JUSTICE SHEARMAN.

1918
July 26.

WILLIAM SUMMERSKILL.

A direction on "intent to defraud" should put the issue of fraud clearly before the jury.

Appeal against conviction.

The appellant was convicted, on July 2nd, 1918, before the Deputy-Chairman, at the County of London Sessions, of attempting to obtain money by false pretences, and was sentenced to four months' imprisonment in the second division.

Compston, K.C. (*H. D. Roome* with him), for the appellant, who was on bail. The appellant is a medical practitioner. On a certain night in the autumn of 1917 a bomb from a Zeppelin fell near his house and a number of people were killed and injured. The appellant was summoned by the police, and was out for two or three hours attending to persons who were suffering from shock. He did not know at the time that there was any public fund to which he might look for remuneration for his services, but ten days or a fortnight later he found that there was such a fund under the direction of the Commissioner of Police. He thereupon sent in his bill, charging 7*s.* 6*d.* for his attendance on each person. He had to rely on information which he received from a third party regarding the names of the persons he attended, and in four instances they were alleged to be inaccurate. Exception was taken to the bill on the ground that it contained the names of persons whom the appellant had never attended and that the charges were excessive, and he was put on his trial of "attempting to obtain 30*s.* from the Commissioner of Metropolitan Police by false pretences with intent to defraud," and he

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was convicted. It is submitted that the conviction should be quashed on the ground that the Deputy-Chairman misdirected the jury on what amounted to a fraudulent misrepresentation; that he left them without any guidance at all with reference to what constituted intention to defraud; and that he nowhere distinguished between such an intent and an honest mistake.

Percival Clarke for the Crown. There was ample evidence on which the jury could find the appellant guilty, and taking it as a whole, the summing up was sufficient to inform the jury quite clearly that if they thought the appellant sent in a false bill with a view to obtaining money which he could not obtain without the particulars contained in it, they were entitled to find him guilty. Even if there were some infelicitous expressions in the summing up, there was no miscarriage of justice.

ROWLATT J.: The question in this case was whether or not the appellant had attempted fraudulently to obtain more money from the Commissioner of Police than he was entitled to. When such a case, which may be a mere case of overcharge which has to be scaled down in the County Court or elsewhere, is before a criminal court, it seems to the Court particularly essential that the issue of fraud should be put to the jury in an unexceptionable way so as to make it clear that, before they find defendant guilty, they must be satisfied that he really has acted fraudulently, and that it is not just an ordinary case of overcharging. In this case, naturally and very rightly, a great deal of attention was paid to the question of amount, and in the summing up there was a great deal of reference to it. In the summing up there are two passages which contain the same formula. The Deputy-Chairman in one place said:—"If he [the appellant] was examining those people, he had still no right to charge for those whom he was not examining, and if you think that he deliberately put in names and particulars, and either knew them to be false or was absolutely careless whether they were false or not, merely to get money which, by a general charge, he could not have obtained, he will still be subject to the criminal law for attempting to obtain money by false pretences." Again, at the end of the summing up, he said:—"If you are convinced beyond all reasonable doubt that, when sending in the bill he was sending

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in a bill which he knew was a bogus bill, that he was filling in in detail circumstances which he had every reason to suppose were wrong, or that he was absolutely careless whether they were right or wrong, with a view to obtaining money which, by putting only 'to professional services rendered' he would not obtain, then you will find him guilty." In criminal cases, however, where questions of fraud are raised, the issue of fraud should be put quite plainly and simply and popularly before the jury. It is very dangerous to refer to "recklessness" or "carelessness." If the formula used in this case had been followed by a general direction that, after all, the question was whether the appellant had acted fraudulently, with an explanation that that means cheating or swindling, it might have been accepted, but, as it is, we do not think it would be right to leave the conviction standing.

Conviction quashed.

Solicitors for Appellant—*Mills and Morley;* for the Respondents, *Wontner and Sons.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE ROWLATT, AND MR. JUSTICE SHEARMAN.

EDWIN AMOS AILES.

1918
July 29.

Where charges are "joined," under Indictment Rule 3 (1915), *all the counts should be tried together.*

Application for leave to appeal against conviction and sentence.

The applicant was convicted, on July 3rd, before the Chairman, at the Surrey Quarter Sessions, of indecent assault, and was sentenced to twelve months' imprisonment with hard labour.

The applicant was not present and was not represented.

The respondents were not represented.

SHEARMAN J.: A somewhat unusual course was followed at the trial of this case. The indictment on which the applicant was charged contained three counts. One charged him with indecently assaulting Annie Violet Day, aged ten, on March 23rd, 1918; another charged him with indecently assaulting the same child on May 11th, 1918; the third with indecently assaulting Minnie Doris Broomfield, aged twelve, on March 27th. In all three cases it was alleged that the applicant committed the assault in a cinematograph theatre where he was an attendant. He was put on his trial on the two counts relating to the child Day, and the child Broomfield was called, quite rightly, to shew that the applicant was a man with distorted sexual passions, and that he was addicted to such acts of indecency. Rule 3 in Schedule I. to the Indictments Act, 1915, states, that "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character." The offences charged against the appli-

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cant in respect of the two children were "founded on the same facts," and each did form . . . part of a series of offences of the same . . . character." All that the Court wishes to say is that a better course than that which was taken would have been to place the applicant on his trial for all the offences charged in the indictment at the same time, and for all the counts to have been tried together. The applicant raises certain points in his application for leave to appeal, but the Court is of opinion that there is no ground for granting such leave, and therefore this application must be dismissed.

Application dismissed.

G. B.

JOHN KEEFE.

Severity of Sentence.

Appeal against conviction.

The appellant was convicted, on June 25th, 1915, before Avory J., at the Maidstone Assizes, of manslaughter, and was sentenced to three years' penal servitude.

C. M. Pitman for the appellant, who was present. The appellant was indicted for the murder of a man named George Buxton, and was convicted of manslaughter. Both men were in the Army and were members of a labour battalion. The case for the prosecution was that, while the two men were quartered in camp, there was a fight between them in the dark, that the appellant was the aggressor, and that, in the course of the struggle, he drew a knife and stabbed Buxton. The defence was that the appellant drew his knife in self-defence, and that it was a pure accident that Buxton was struck with it. It is submitted that the defence of accident was never put before the jury by the judge in his summing up. He referred to *George Smith*, 8 C. & P. 160, 1837.

Sir P. Rose-Innes and R. E. Moore for the Crown, were not called on.

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July 30th.—SHEARMAN J.: The Court has gone very carefully into all the circumstances of this case. They seem to be that the dead man made a most unprovoked attack on the appellant. Threatening demonstrations were made and both parties became enraged. The appellant was the smaller man and drew his knife, and a small wound was inflicted on Buxton on that occasion. The men went into a washhouse and then, after an appreciable time, they both went out again, and on the appellant's own evidence they were both willing to fight. They closed. The appellant had the knife which he had drawn before open in his hand, and Buxton received the wound from which he died. An appeal was lodged on behalf of the appellant on the ground that his defence was not adequately put forward by the judge in his summing up. The Court thinks that there is no substance in the complaint, and that the judge sufficiently directed the jury. He pointed out that, if two men willingly enter into a fight and one of them does not throw away a knife, but continues to hold it, and in the struggle the other man is injured by the knife and dies, the first man must be committed of manslaughter at least. That having been put before the jury, we cannot interfere with this conviction, but it does appear to us that the story which the jury accepted was that the men, while unlawfully struggling, rolled over one another on the ground, and that no wound was inflicted intentionally by the appellant. In those circumstances, we think that the sentence should be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

Solicitor for Appellant—*S. Priestman*, Hull.

1918
July 30.

SIDNEY THORPE.

Detention in a Borstal institution substituted for imprisonment with hard labour.

Appeal against sentence.

The appellant pleaded guilty, on July 6th, 1918, before the Chairman, at the Middlesex Sessions, to three indictments for house-breaking, and was sentenced to concurrent sentences of two years' imprisonment with hard labour.

The appellant in person: This is my first offence

The Crown was not represented.

DARLING J.: The appellant pleaded guilty to three indictments charging him with house-breaking, and was sentenced to two years hard labour, and was recommended for the modified Borstal treatment. Another boy helped him in breaking into the house. That boy was of the same age, namely, sixteen years, and was sentenced to three years' confinement in a Borstal institution. The Chairman of the Middlesex Sessions would have given the appellant the same sentence, but the governor of the prison reported that he did not think that the appellant was fitted for the Borstal treatment owing to his antecedents, but that he thought he might be subjected to the modified Borstal treatment. If that course were followed the appellant, although only sixteen, would be treated as an ordinary prisoner in any ordinary prison, except that some modifications of the Borstal system would be applied in his case. The Court think that the governor gave wrong advice altogether. This was a case for Borstal treatment, and the Court alters the sentence to three years' detention in a Borstal institution.

Sentence varied.

G. B.

BEFORE

MR JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE LUSH.

PERCY JOSEPH TWISS.

1918
August 20.

Thompson, 13 *Cr. App. R.* 61, 1918, *considered.*
A juryman during the trial in which he is engaged ought not to talk about the facts, especially to a witness.

Appeal against conviction.

The appellant was convicted, on July 11th, 1918, at Chester Assizes, before Mr. Justice Coleridge, of acts of gross indecency with a boy, and of attempting to procure two other boys to commit similar acts, and was sentenced to nine months' imprisonment in the second division.

Sir Ellis Griffith, K.C. (*Trevor Lloyd* with him), for the appellant, who was not present. The appellant was convicted on four counts, two of which charged him with committing an act of gross indecency on two occasions with a boy named Marshall, and the other two charged him with attempting to procure boys named Warren and Lewis to commit acts of gross indecency. The grounds of the appeal are, (1) wrongful admission of evidence with reference to photographs, documents and articles found on the appellant or in his rooms; (2) misdirection; (3) one or more of the jurymen, during the luncheon adjournment on the first day of the trial, had conversations with certain witnesses for the Crown, including the boys in respect of whom the appellant was charged. With regard to the wrongful admission of evidence, the boy, Marshall, stated in the witness-box that during one of his visits to the appellant's lodgings, the appellant, in the sitting-room shewed him some photographs of military

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troops. Afterwards, in the bedroom the appellant shewed him some more photographs. Detective-sergeant Roberts stated in the witness-box that he had found in the appellant's possession a pocket wallet and sixteen photographs of boys in bathing costumes and of a nude boy. In the appellant's lodgings he had found 279 photographs in albums, four photographs of nude boys, and some photographs of boys partly nude, in a frame. Objection was taken at the trial that the photographs were not evidence. It is submitted that they could only be relevant to the charge in respect of the boy Marshall, as Marshall was the only one of the boys who had been to the appellant's lodgings, and Marshall had not identified any of the photographs. Mr. Justice Coleridge allowed the detective to describe these photographs in the witness-box, remarking that Marshall could be recalled to identify them afterwards. It was contended that Marshall should identify them before they were produced. Ultimately, Marshall was recalled. He only identified some photographs in a frame, which he said he had seen in the appellant's bedroom, and the other photographs were then excluded by Mr. Justice Coleridge. The mischief, however, had already been done when the detective in evidence described the photographs as being of nude and partly nude boys. He referred to *Thompson*, 1918, A. C. 221; 87 L. J. K. B. 478; 118 L. T. 418; 34 T. L. R. 204; 13 Cr. App. R. 61.

[DARLING J.: You have to satisfy this Court that the photographs were rightly excluded. We think Mr. Justice Coleridge was too favourable to you in excluding them.

AVORY J.: *Thompson's* case is a distinct authority against you.]

This case is distinguishable from *Thompson's* case. There the sole issue was the question of identity, and evidence of the possession of indecent photographs was held to be admissible to corroborate evidence of identity and to rebut the defence of *alibi*. *Thompson's* case is not an authority for saying that such evidence would be admissible generally. To admit such evidence in a case like this is like admitting evidence of a previous conviction, or evidence of general bad character.

Affidavits were read that during the adjournment of the trial for luncheon certain of the jurymen had conversed with some of

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the witnesses for the Crown, including the boys in respect of whom the appellant was charged. Mrs. Hawkins, the proprietress of the house where the appellant lodged, deposed that she was a witness for the prosecution, and gave her evidence in the morning of the first day of the trial. With another witness for the prosecution she went to the hotel for lunch. Two of the jurymen came in, and one of them said to her: "What do you think of your lodger now?" She replied, "I always found him a gentleman." He then said: "What do you think of the photographs?" She replied, "If the photographs had been offensive they would not have stopped long in my house." Two other affidavits, made by men named Hirst and Hallows, were that just before the adjournment for luncheon on the first day of the trial, Mr. Justice Coleridge had stated that Marshall who had given his evidence, would be recalled to identify some photographs. During the adjournment, Marshall and the two other boys went into a café for luncheon. Three of the jurymen went into the same café, and one of them went to the table at which the boys were sitting and had a conversation with them which lasted six or eight minutes. He was addressing Marshall, but the other boys were also answering questions. On the Court's resuming, the jury were questioned by the Judge, and one juryman only admitted having had a conversation with the boys, and said that it was only with reference to the duration of the case. It is contended that the doctrine of *Ketteridge*, 1915, 1 K. B. 467; 84 L. J. K. B. 352; 112 L. T. 783; 79 J. P. 216; 59 S. J. 163; 31 T. L. R. 115; 11 Cr. App. R. 54, should be extended and applied to the facts of this case. The proceedings were abortive, and should be begun again. (See also *Ward*, 10 Cox C. C. 573; 17 L. T. 220; 16 W. R. 281, 1867.

Artemus Jones and *Ralph Sutton* for the Crown, were not called on to argue.

DARLING J.: In this case the appellant was convicted of acts of gross indecency with one boy and of inciting others. He was sentenced to nine months' imprisonment in the second division. He appeals on several grounds. The first is that Mr. Justice Coleridge wrongly admitted the evidence of a policeman who

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described some photographs as being photographs of nude boys. The photographs were not put in evidence; and if any evidence was wrongly admitted, it was secondary evidence of the photographs. If we took the view that what was said was not evidence, it would even then not vitiate the trial as we should rely on the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. We are convinced that, on the whole, there has been no material injustice. But it is not necessary for the Court to say that, because we are of opinion that the photographs which the constable described would have been evidence themselves if they had been tendered by the prosecution, and, certainly, if they had been put in evidence, they would have done the appellant far more damage than the mere description which the policeman gave of them. It is not necessary to give a long disquisition why they would be evidence; it is sufficient to say that we think that that appears from the case of *Thompson*. I think there has been a misconception regarding what *Thompson* means. It was contended that that case decided that photographs in such a case as this would only be admissible as evidence where the defence was an *alibi*. But, in our view, it appears plainly from the judgment of the Court of Criminal Appeal that such a case as the present would be covered. The learned Lords also, in the House of Lords where the decision of the Court of Criminal Appeal was affirmed, said that it was not only in a case where the defence was mistaken identity that the photographs were admissible as evidence. They said that such things would be evidence to prove what was the practice of the man who had such articles in his possession, and compared them with the tools of a burglar or the apparatus of an abortionist, which are frequently given in evidence as being the appliances and implements of people carrying on that particular kind of crime.

Nor do we think that there is any misdirection in the summing up.

There remains only one other point, namely, that with regard to the conduct of one, or possibly more than one of the jury, in the course of the trial. Formerly, in charges of felony, the jury were not allowed to separate. But the tendency of the legislature has been to trust jurymen more and to relax the old rule with regard to them. In 1897, there was passed the Juries

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Detention Act, which allows jurymen to separate in cases of felony, except on a charge of murder. Can it be thought that the legislature when passing that Act of Parliament, supposed that jurymen when they leave the Assize Court, the case being part heard, and go out to luncheon, never mention the case to anybody? It would be absurd to think such a thing. An assize town is full of the acquaintances of the jurymen, and full of curious people. *Ketteridge* was a different case. There, after a judge had summed up one of the jurymen got away from the others and went out into the town, instead of doing that which it was his bounden duty to do, namely, to discuss the case with his fellow-jurors. He separated himself from them and made it impossible for any verdict to be given, until he had been found, brought back and had discussed the verdict. Lush J. in his judgment in that case said: "If a juror after the Judge has summed up in any criminal trial, separates himself from his colleagues, and not being under the control of the Court, converses, or is in a position to converse, with other persons, it is an irregularity which in the opinion of the Court renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence these proceedings afresh." I myself was a member of the Court, and the judgment which was delivered by my brother Lush was the considered and written judgment of the Court; and this Court abides by it. It is to be noticed that there was an absolute breach of the whole procedure laid down as governing the conduct of the Court at the time of the summing up and after the summing up, because a bailiff is sworn to keep the jury together and to see that they do not converse with anybody at all, except with one another. The whole solemn procedure of the Court had been violated in that case. In this case, however, the trial was proceeded with. The jurymen did what jurymen constantly do. We all know that they do it, and the legislature knows that they do it. In those circumstances, it is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the appellant in this case. It is not enough to say that he spoke to somebody; it is not enough to say that the person to whom he spoke was a witness in the case, although that makes it necessary to consider the matter

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more carefully. I hope that nothing decided in this Court to-day will incline anybody to think that we hold it to be a laudable practice for the jury to go out and talk to people. They had much better keep their own counsel and not speak to anybody. If they speak to anybody about the case, they certainly ought not to speak to a witness, because in that case their conduct may be open to grave suspicion. But we have heard some affidavits read, by Mrs Hawkins and by two men. The matter was mentioned to the judge and he was satisfied with the explanation given by the juryman that all that was said was to ask one of the boy witnesses how long the case was likely to last, because it had been mentioned that the case previously had lasted a long time, when the jury disagreed. The judge accepted the explanation. The only evidence of what was said was given by Mrs. Hawkins who was a witness for the prosecution. She was keeper of the lodgings where the prisoner lodged. She said that the juror said: "What do you think of your lodger now?" She replied: "I always found him a gentleman." He then said: "What about the photographs?" She replied: "If the photographs had been offensive they would not have stopped in my house." Either she was talking of the four photographs in the one frame which we have seen—and, if so, her description of them would be neither here nor there, because the juryman could see them for himself—or if they were the others, and if he thought they were offensive photographs from what the policeman said, he only received from Mrs. Hawkins information that they were not offensive. He only got the information that if they had been offensive they would not have stopped long in her house. On the other hand, "What do you think of your lodger now?"—if the juryman had formed a bad impression, the only thing that was said would tend to remove it, because all she said was "I always found him a gentleman." Therefore there was nothing which, in our opinion, could be supposed to prejudice the case of the appellant. We desire to repeat as strongly as we can, that although jurymen are allowed to go about while the trial is proceeding and cannot be prevented from doing so, although they are allowed to go home and the case may last several days, we say nothing to encourage their discussing the evidence in the trial; but we should desire that they should, if they must talk, talk of other topics, only

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discussing the trial with the other jurymen when the trial comes to a close. We cannot see that anything was done to prejudice a fair trial, and the other points are points on which we are clearly against the appellant. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitor for Appellant—*W. P. Ellen* for *J. G. Lawrence*, Liverpool.

T. W. M.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE LUSH, AND MR. JUSTICE ROCHE (WHO DURING PART OF THE SITTING TOOK THE PLACE OF DARLING J.).

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August 21.

CARL ERIC HOLMEN.

A Court of Quarter Sessions has power to transmit for trial to a Court of Assizes counts in an indictment tried by it on which the jury did not agree. This power is unaffected by 7 Geo. 5, c. 4, the Grand Juries (Suspension) Act, 1917.

Appeal against conviction.

The appellant was convicted, on July 20th, 1918, at Swansea Assizes, before Mr. Justice Coleridge, of larceny as a servant, and was sentenced to twelve months' imprisonment in the second division.

Lincoln Reed for the appellant, who was not present. The appellant was tried, on July 13th, 1918, at the City Quarter Sessions at Cardiff, before the Recorder, on an indictment which contained fifteen counts. Three were for counts for embezzlement; four counts for stealing valuable securities, to wit, cheques; and seven counts for stealing sums of money amounting to £2,210. The four counts for embezzlement were withdrawn. On the four counts for stealing valuable securities, the jury, by the direction of the Recorder, acquitted the appellant. On one of the seven counts for stealing money, namely, a count for stealing £400, the appellant was found *Not Guilty* on the evidence. There were thus nine counts disposed of; and the jury failed to agree on the remaining six counts. The Recorder then transmitted the indictment to the Glamorganshire Assizes at Swansea that the appellant might be re-tried on the six counts on which the jury failed to agree.

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When the indictment was presented at the Assizes, it contained twelve counts, namely, six counts for stealing sums of money amounting to £1,810—these being the counts upon which the jury at the Quarter Sessions had failed to agree—and six alternative counts for misappropriation of money entrusted to him for a particular purpose. It is contended that the appellant having been put upon his trial at the Quarter Sessions could not be sent to the Assizes in the absence of a writ of *certiorari*. Admitting that the Recorder had a discretion to send the case to the Assizes if he thought that the charge was one which could be more properly tried there, then it is contended that upon that point the Recorder had already exercised and exhausted his discretion by trying it at the Quarter Sessions. Having thus exhausted his discretion with regard to the fitness of the charge being tried at Quarter Sessions, the Recorder had no jurisdiction to send the indictment to the Assizes. Moreover, the indictment which was presented at the Assizes was a new indictment and not a "transmitted" indictment, and it contained charges which were not included in the indictment tried at the Quarter Sessions. Sub-s. (2) of s. 1 of the Grand Juries (Suspension) Act, 1917, specifies the cases where an indictment may be presented in the appropriate Court without a true bill having been found by a grand jury. The indictment in this case could not, under that sub-section be presented to the Assize Court. Moreover, the Assize Court was not the "appropriate court" within the meaning of that Act. The only court which had power to deal with the indictment in this case was "the court specified in the recognisance entered into by the prosecutor or witnesses before the committing justices." See sub-s. (6) of s. 1 of the Grand Juries (Suspension) Act, 1917. That was the Court of Quarter Sessions. Therefore the Assize Court had no jurisdiction.

Roland Oliver for the Crown. The appellant's objection is purely technical. So far as merits go he has no ground for complaint. The territorial jurisdiction of the Assize Court in this case cannot be contested. Further, the Recorder clearly had a discretion, on the ground of fitness, to transmit the indictment to the Assizes. With regard to the additional counts which had been added, they were all founded on facts or evidence disclosed in the depositions taken before the justices who committed the

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appellant for trial at the Quarter Sessions. With regard to the Grand Juries (Suspension) Act, as soon as the Recorder exercised his discretion of transmitting the case to Assizes, the Assize Court is for all purposes "the appropriate court" within the meaning of the Act.

Lincoln Reed replied.

AVORY J.: The appellant was tried at the Assizes upon an indictment which we now understand was presented at the Assize Court. It appears that before that indictment was presented in that Court, the appellant had been put upon his trial at the City Quarter Sessions at Cardiff on an indictment which contained several counts on which he was ultimately convicted at the Assizes. At the Quarter Sessions he was acquitted by direction of the Recorder on certain counts of the indictment because they could not be supported in law, and on other counts, because they were not supported by the evidence. The jury failed to agree on the remaining counts. These remaining counts, which were charges of larceny of the proceeds of the cheques, were tried at the Assizes, and it is upon these charges of larceny that the appellant was convicted. When the jury disagreed, the Recorder remitted the case to the Assizes. He had ample power to do so. Counsel for the appellant has contended that, having embarked on the enquiry, he had not that power. But that power exists in the Commission of the Peace, and it is to be exercised in any case in which the Court of Quarter Sessions is of opinion that the case is one which is more fit to be tried at the Assizes than at the Quarter Sessions. It is obvious that it may become more apparent after a case has been embarked upon that it is a fit one to be tried at the Assizes. In this case the jury were unable to agree. We therefore think that the Recorder had power to remit the case to the Assizes and that that power was properly exercised in this case. Then the case became for all purposes an Assize case. That is an answer to the only point in the case. Counsel for the appellant has contended that under the Grand Juries (Suspension) Act, 1917, an indictment can only be presented in "the appropriate court," namely, "the court specified in the recognisances" taken before the committing justices. The "appropriate court" is defined in sub-s. (6) of s. 1 of the Grand Juries

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(Suspension) Act, 1917, as "the court to which the accused is committed for trial (that is to say, the Court specified in the recognisance entered into by the prosecutor or witnesses before the committing justices), or which is specified in the consent or direction given by a judge of the High Court or the Attorney-General or Solicitor-General, as the case may be." Counsel for the appellant says that the Court of Quarter Sessions is the "appropriate court" in this case, within that definition. But assuming that the Recorder properly remitted the case to the Assizes—and we have decided that he did—then the Assize Court is the appropriate court within sub-s. (6) of s. 1 of the Grand Juries (Suspension) Act, 1917, and as such would have power under sub-s. (2) to add new counts to the indictment, provided such counts are founded on facts or evidence disclosed in the depositions taken before the committing justices. The addition of these counts was justified by the evidence on the depositions. Therefore, the objection fails and the appeal must be dismissed.

Appeal dismissed.

Solicitor for Appellant—*Harold Lloyd*, Cardiff.

T. W. M.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE LUSH, AND MR. JUSTICE SALTER.

1918
October 15.

ARTHUR SMITH.

Severity of sentence is justified by the frequency of the particular crime. Sentence varied to avoid forfeiture by law.

Appeal against sentence.

The appellant was convicted on July 10, 1918, before the Recorder, at Leeds Sessions, of shop-breaking and warehouse-breaking, and was sentenced to two concurrent sentences of twelve months' imprisonment with hard labour.

The *Appellant* in person.

Percival Clarke for the Crown.

DARLING J.: The appellant, who is quite young, was convicted of shop and warehouse breaking, and was sentenced to two concurrent sentences of twelve months' imprisonment with hard labour. The Recorder of Leeds informs us that the reason for the severity of the sentence was that there had been an epidemic of shop-breaking in Leeds. The appellant was punished as an example to others, which was perfectly legitimate. But the circumstances of this case are peculiar. The appellant joined the Army when he was only 17 years of age. He went out to France and became entitled to a pension on his discharge on account of ill-health. The effect of sentencing him to twelve months' imprisonment with hard labour would be the forfeiture of his pension which he has earned by serving his country at a time when thousands of others who were better able declined to do

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so. If he had not been a soldier the sentences would not have been unduly severe, but we must remember that the loss of his pension would be added to the sentences passed by the judge. The fact that he has been convicted of felony renders his pension subject to forfeiture by the Army authorities, and we prefer to leave it to them to say whether it is a case in which the forfeiture should be enforced. To do this we must alter the sentences. We, therefore, direct that they be changed to two consecutive sentences of six months' imprisonment without hard labour. People must not infer that it is the opinion of this Court or of judges generally that soldiers should be allowed to commit crimes without forfeiting their pensions. But here there are particular circumstances which justify the course we have taken.

Sentence varied.

G. B.

GEORGE HARRIS.

Severity of sentence in the case of two convictions as a habitual criminal.

Appeal against sentence.

The appellant was convicted on August 8, 1918, before the Deputy Chairman, at London Sessions, of larceny and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

The *Appellant* in person.

J. A. C. Keeves for the Crown.

DARLING J.: The appellant stole a parcel of cigarettes from a truck on a railway station. He is a man of bad record, and in 1908 was convicted at Birmingham of being a habitual criminal. Under the Prevention of Crime Act, 1908, a person can be found to be a habitual criminal if on a previous occasion he has been found to be a habitual criminal and sentenced to preventive detention, and that is the evidence which was given at

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the trial which we have to deal with now. It is a very hard law, but it is as I have stated. We feel in this case that if the matter had come before one of us he would not have imposed a sentence of penal servitude, and, therefore (see s. 10 (1) of the Prevention of Crime Act, 1908), he could not have sentenced the appellant to a term of preventive detention. In the circumstances, we think the sentence should be reduced to one of eighteen months' imprisonment with hard labour. What we are doing cannot form a precedent for another case, for each case must be dealt with on its own facts.

Sentence reduced.

G. B.

BEFORE

MR JUSTICE AVORY, MR. JUSTICE McCARDIE, AND MR. JUSTICE SALTER.

THOMAS GEORGE BORHAM,
OTHERWISE GEORGE SAMUEL DAVISON.

1918
October 24.

Severity of sentence.
The Court leans against consecutive sentences of hard labour for a total term of more than two years.

Appeal against sentence.

The appellant was convicted, on the 21st September, 1918, at Middlesex Sessions, of receiving stolen goods, and sentenced by the Chairman to eighteen months' imprisonment with hard labour to commence on the termination of a similar sentence for fifteen months' imposed on the appellant in April, 1918, at the Newcastle City Quarter Sessions for receiving.

W. Higgins for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was tried, on the 31st July, 1918, at Middlesex Quarter Sessions, on a charge of receiving some goods which had been stolen from a dwelling-house in Chiswick on the 30th November, 1917, and as the jury were unable to agree he was subsequently tried for the same offence, when he was convicted and sentenced to a term of eighteen months. The term of eighteen months having been ordered to be consecutive on a sentence of fifteen months imposed on the prisoner at Newcastle, the result is that, unless the Middlesex sentence be reduced, the appellant will have to serve a continuous term of two years and nine months. The sentence, in the circumstances,

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is, it is submitted, too severe. The value of the goods traced to the prisoner—a mackintosh, a pair of boots, and some beads which had been for some time in use—was small. Before the sentence at Middlesex was pronounced upon the prisoner, five previous convictions (including the Newcastle conviction) were proved against him. His first conviction was in June, 1914, when he was eighteen years of age, and on that occasion he was bound over at Middlesex Sessions by the Deputy-Chairman on condition that he joined the army. He joined the 9th Lancers, and subsequently the Royal Field Artillery, but unfortunately he appears to have deserted from both. On the 3rd May, 1916, the prisoner was bound over at the North London Sessions after having pleaded guilty to a charge of larceny, and in the interval between that date and the time of the conviction at Newcastle he had sentences at Shoreham Police Court (three months) and at the Thames Police Court (six weeks) for thefts of property of small value. In the circumstances, it is submitted that the sentence imposed by the learned Chairman at Middlesex Sessions is far too severe and that it ought to be very considerably reduced by this Court. If, before sentence had been passed upon him at Newcastle the prisoner had informed the learned Recorder that he had been concerned in receiving some property which had been stolen from a house in Chiswick, London, and wished that offence to be taken into account in the sentence which the Court was going to impose upon him, is it not very probable that the sentence of fifteen months, if at all increased, would not be increased to any greater extent than eighteen months? There is another matter which, I think, ought to be mentioned to the Court. Before the sentence at Middlesex, now under appeal, was pronounced, a police officer who was speaking about the prisoner's record, in reply to a question put by the learned Chairman, stated that the reason why the prisoner had been brought from Newcastle to be tried at Middlesex was that a report had got about that the police at Chiswick had connived at his escape from London and had purposely failed to arrest him. Now, if there was such a report, there is nothing to shew that the prisoner had anything whatever to do with it; and the fact that the prisoner would not, but for such report, have been brought to take his trial at Middlesex, that is, that he would have been left at Newcastle, ought to be taken into consideration by this Court.

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McCardie J.

McCARDIE J.: The effect of the two sentences, unless the Court interferes, will be that the appellant must serve a continuous term of thirty-three months' imprisonment with hard labour. This severe result does not receive our approval. The term of eighteen months imposed by the learned Chairman at the Middlesex Sessions must therefore be reduced to three months, to commence at the expiration of the sentence imposed at Newcastle.

Sentence reduced.

W. H.

JOSEPH CLAY, JOHN GRANT, SAMUEL VALE.

Severity of sentence.
It is impossible to "standardise" sentences for receiving stolen property with guilty knowledge.

Appeals against sentence.

The appellant, Clay, was convicted, on July 23rd, 1918, before Mr. Justice Atkin, at Birmingham Assizes, of larceny and receiving, and was sentenced to four years' penal servitude. At the same time, the appellants, Grant and Vale, were convicted of receiving, and each sentenced to three years' penal servitude.

Kenelm Preedy for Clay, referred to *Knight*, 1912, 7 Cr. App. R. 281; 28 T. L. R. 481.

Maddocks for Grant.

Sir E. Marshall-Hall, K.C., and *Arthur Ward* for Vale.

AVORY J.: These three appellants were convicted of receiving stolen goods. A series of grave offences were proved against them lasting over a considerable period of time. It is useless in such cases as this to cite other cases in which particular sentences

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have been reduced since there are no two cases exactly alike on the facts. In this case we must consider whether the facts justify the sentences, which have been rightly described as very severe. There is no ground for supposing that any one of these three men had been engaged in the trade of receiving stolen goods, that is to say, that they had been habitually receiving stolen goods from any thief who cared to go to them. They received goods from one thief only, but their offence was serious, for they received from him over and over again. Otherwise, the men bore good characters. In all the circumstances of this particular case, the Court has come to the conclusion that justice will be satisfied by reducing the sentences as follows: that of Clay to twenty months' imprisonment with hard labour; those of Grant and Vale to twelve months' imprisonment with hard labour each.

Sentences reduced.

Solicitors—*J. Hall-Wright*, Birmingham, for Clay; *Freeland and Warder*, Birmingham, for Grant; *Smiles & Co.*, for Enoch *Evans & Son*, Walsall.

G. B.

GEORGE STUART ELLIS.

Severity of sentence.

Appeal against sentence.

The appellant was convicted, on September 12th, 1918, before Commissioner Rentoul, at the Central Criminal Court, of bigamy, and was sentenced to eighteen months' imprisonment with hard labour.

F. Thoresby for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

AVORY J.: The appellant was convicted of bigamy. If he had appealed against his conviction, it seems highly probable that the Court would have felt itself bound to quash it on the

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ground that there was no proper trial. It was in fact a grotesque parody of a trial. After evidence had been given that the appellant had gone through a ceremony of marriage while his wife was still alive, he went into the witness-box and gave evidence that he left this country after his marriage and went to Egypt, and that he received letters from his wife stating that she had been told that the marriage was not legal, and that he thereupon consulted a judge of the Mixed Tribunals in Cairo, who told him that his wife was quite right and that he was free to marry again. Commissioner Rentoul then said: "That does not matter at all. The point is this, if you had reason to believe your wife was dead you would not be guilty of bigamy at all, but the marriage with the second wife would not be valid. . . . You swear you knew she was dead?" The appellant had never said anything of the kind. Counsel for the prosecution said: "My lord, on his own evidence his wife was writing to him." Commissioner Rentoul: "Better not say anything that is not entirely correct, because this is a case in which I am inclined to deal with you in the best way I can." The appellant made some effort to get out something more in his own favour. A long discussion then took place between Commissioner Rentoul and a detective-sergeant whether the appellant would be allowed by her relatives to marry his second "wife." Commissioner Rentoul: "If you can get the mother's consent it would be better. It is an unfortunate case altogether, but I think I will let you out without sentence." That was before the verdict of the jury who had not found the man guilty. The judge was reminded that he must take the verdict of the jury. The following dialogue then took place:

The Judge (to the Appellant): Do you want to say anything more?

The Appellant: No.

The Judge (to the Jury): Well, gentlemen, of course you will bring in a verdict of guilty.

The Clerk of the Court: Gentlemen, have you considered your verdict?

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The Foreman: We find him guilty.

No doubt the jury thought that the judge would promptly release him. The detective-sergeant then went into the witness-box and proved that there were six previous convictions against the appellant for stealing and false pretences, the last and longest sentence being one of twelve months' imprisonment in January, 1914. Commissioner Rentoul said he took a different view of the man then, and "for the sake of the girl," namely, the second "wife," he sentenced him to eighteen months' imprisonment with hard labour.

In the opinion of this Court, as there was no contradiction of the appellant's story that he honestly believed that his first marriage was not legal, and in view of the fact that the first wife is dead and that the second woman wishes to marry the appellant, the appellant has been abundantly punished by having been in custody for six weeks, and the sentence should be reduced to one of one day's imprisonment.

Sentence reduced.

G. B.

October 24, 25.

CHARLES FRANCIS THOMAS HOLMES CHAPMAN, WILLIAM EDWARD DOYLE.

Concurrent sentences of penal servitude and imprisonment with hard labour should not, as a rule, be imposed.

Appeals against conviction and sentence.

The appellants were convicted, on September 20th, 1918, before Mr. Justice Darling, at the Central Criminal Court, of conspiracy and false pretences, and were sentenced, Chapman to concurrent sentences of eighteen months' imprisonment with hard labour and three years' penal servitude, and Doyle to eighteen months imprisonment with hard labour.

Patrick Hastings for Chapman.

Hemmerde, K.C., and *Cecil Hayes* for Doyle.

Gill, K.C., and *Sir Archibald Bodkin* for the respondent.

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CHARLES FRANCIS THOMAS HOLMES CHAPMAN, WILLIAM EDWARD DOYLE.

Avory J.
McCardie J.
Salter J.

The case does not call for report, except on the point regarding sentence.

AVORY J. having given judgment dismissing the appeals against conviction, continued:

It has been pointed out that the imposition of concurrent sentences of penal servitude and of imprisonment with hard labour creates great difficulty for the prison authorities. It is in practice almost impossible to apply such sentences. The Court is of opinion that the sentence passed on Chapman of three years' penal servitude is not excessive and therefore it will stand, the concurrent sentence of eighteen months' imprisonment with hard labour being removed.

Sentence varied.

Solicitors—*Wontner & Sons* for Chapman; *G. R. Cran* for Doyle; *Chas. Russell & Co.* for the respondent.

G. B.

WILLIAM BRAIN, OTHERWISE JACKSON.

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In a direction on receiving stolen property with guilty knowledge, circumstances calling for an explanation by the defendant must not be confused with circumstances absolutely establishing guilt.

It is a serious misdirection to lead the jury to suppose that they must ask themselves: "Has the defendant proved himself innocent?"

Appeal against conviction and sentence.

The appellant was convicted, on July 26th, 1918, before the Recorder, at Bristol Sessions, of house-breaking, larceny and receiving, and was sentenced to five years' penal servitude.

Kenelm Preedy for the appellant, who was present. The conviction of the appellant should be quashed since the Recorder misdirected the jury by telling them that if, on the trial of an indictment for receiving stolen goods, the prosecution prove that the prisoner has been in the possession of recently stolen goods,

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the *onus* is then on the prisoner to satisfy the jury that he came by them honestly: *Schama and Abramovitch*, 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 31 T. L. R. 88; 11 Cr. App. R. 45, 1914.

Roland Oliver for the Crown: Although there are passages in the summing up which are clearly misdirections, no substantial miscarriage of justice resulted and the Court will dismiss the appeal under the proviso to s. 4 of the Criminal Appeal Act, 1907. Appellant by his cross-examination of witnesses for Crown rendered himself liable to being cross-examined on his own character, which was very bad. He was not in fact so cross-examined, but the Court can take this into account in considering whether to apply the proviso to s. 4.

AVORY J.: The appellant was convicted of breaking and entering a dwelling-house at Bristol and of stealing jewelry on April 1st, 1918, and also of receiving some of the jewelry which was found in his possession on April 3rd. The jury returned a verdict of guilty on the whole indictment, but it is quite possible that they intended to find the appellant guilty only of receiving. It certainly would appear that the Recorder took that view, and that throughout the summing up he was directing the minds of the jury to that charge. In his summing up he said: "Assuming that you accept this evidence [that the property found in the possession of the appellant was the property of the prosecutrix], then comes the second point, that it is not proved that the prisoner knew it was stolen and, anyhow, that he was not the man who stole it. When things are stolen and soon after are found in the possession of A. B., the law says: 'Once it is proved that those are part of the stolen goods it is for the defence now to satisfy the jury'—I will not say as a presumption, because it is not a legal presumption—'that the prisoner came by them honestly.'" It is clear that he was telling the jury that once it is proved that a man has been in possession of recently stolen goods it is for the defence to satisfy the jury that he came by them honestly. The Recorder continues: "If the prisoner is found dealing with it two days after it is stolen . . . . then the burden shifts." With all respect to the Recorder, he appears to have confused the principles of law applicable to this case. It is quite true that if a

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man is found in possession of recently stolen property it may give rise to a presumption either that he is the person who actually stole it or that he received it knowing it to have been stolen. What "recent" stealing is depends on the character of the goods. Some naturally change hands quicker than others. But after the presumption has been raised it is still the duty of the judge to tell the jury that it is only a presumption which calls for some explanation by the prisoner. If he gives no explanation or one which the jury do not believe, the jury may presume that he is the person who stole the property or received it knowing it to have been stolen. The jury may presume this, but the burden of satisfying them that they ought to do so still rests on the prosecution. Here, apparently, the Recorder was confusing circumstances which call for some explanation by the prisoner and circumstances which establish beyond doubt that he is guilty. He placed the burden on the wrong shoulders. He ought to have told the jury that if there was any doubt in the matter the appellant was entitled to be acquitted, whereas he practically said that if there was any doubt the jury must ask themselves the question: "Has the prisoner proved himself innocent?" That seems to this Court to be so serious a misdirection that we cannot act under the proviso to s. 4 of the Criminal Appeal Act, 1907, and say that in spite of it no substantial miscarriage of justice has occurred. We certainly cannot take into account for this purpose the appellant's previous bad character, because it was not before the jury. This appeal must, therefore, be allowed.

Conviction quashed.

Solicitors for the Appellant—*Philip Baker & Co.*, Birmingham.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

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November 4.

FRANK GREEN.

Sentence mitigated in view of appellant's giving information in the interests of justice.

Appeal against sentence.

The appellant was convicted, on July, 1st, 1918, before Mr. Justice Salter, at the Bristol Assizes, of shop-breaking and house-breaking, and was sentenced to seven years' penal servitude.

S. Duncan for the appellant, who was present. The appellant admittedly has a bad character. Since 1902 he has been convicted twelve times of different offences, mostly of dishonesty, and in 1912 he was sentenced to three years' penal servitude for larceny. He was released in 1914. He joined the army voluntarily, served until 1916, and was twice wounded severely. Apart from that, his army record is bad. But with the exception of the offence now in question he has not been convicted of any offence since he left the army. When the judge passed sentence he had been informed that the appellant had given certain information to the police. Later, the police found this information to be true; the stolen property in at least half-a-dozen other cases was recovered; and the appellant gave evidence which led to the conviction of a man named Brain at Bristol later in July (above, p. 197). It is submitted that these facts should have been taken into consideration and that the sentence is excessive.

The prosecution was not represented.

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FRANK GREEN.

AVORY J.

AVORY J.: It does not appear that Mr. Justice Salter gave any effect to the plea made on behalf of the appellant that he had assisted the interests of justice. That was possibly because it may easily be said that a man has given information to the police, but until it is ascertained that the information is of any service it may be right not to give any effect to it. This Court knows, however, what occurred subsequently, and is of opinion that the appellant should have the benefit of it. That principle has already been acted on in this Court in the case of *James and Sharman*, 1913, 9 Cr. App. R. 142, when Darling J. in giving judgment said that it is expedient that thieves should be persuaded not to trust one another. The appellant has helped the interests of justice and is entitled to credit for doing so. Therefore, in spite of his record, his sentence will be reduced to one of three years' penal servitude.

Sentence reduced.

Solicitors for Appellant—*Haslewood, Hare & Co.*, for *E. J. Watson*, Bristol.

G. B.

WILLIAM FISHER.

When one of two or more convictions is quashed, sentence may be reduced.

Appeal against conviction and sentence.

The appellant was convicted, on July 31st, 1918, before the Common Serjeant, at the Central Criminal Court, of receiving stolen property with guilty knowledge, and of conspiracy, and was sentenced to three years' penal servitude.

Walter Stewart for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

Percival Clarke for the Crown.

DARLING J.: The Court is of opinion that there was not sufficient evidence to justify the conviction of receiving. On the other hand, there was plenty of evidence on which the jury could

1918
November 4.

WILLIAM FISHER.

Darling J.

properly find the appellant guilty of conspiring to obtain money by false pretences. This form of conspiracy cannot be punished by a sentence of penal servitude. It is punishable by fine and (or) imprisonment with or without hard labour. The sentence must be reduced to one of eighteen months' imprisonment with hard labour.

Conviction for receiving quashed; sentence reduced.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE, AND MR. JUSTICE AVORY.

JAMES MARSTON.

1918
11 *November.*

On an indictment for obtaining by false pretences, control of the chattels, &c. alleged to be obtained must be distinctly proved.

Appeal against conviction and sentence.

The appellant was convicted, on October 16th, 1918, before the Chairman, at the Chester County Sessions, of obtaining by false pretences and attempted false pretences, and was sentenced to five years' penal servitude. He was found guilty on an indictment charging him with obtaining £1 in money from one Page Crone by a false pretence, and with attempting to obtain by a false pretence from one Henry Mills £6 19*s.* in money. The prosecutors alleged that he wrote from a hotel in Wallasey answering advertisements inserted by them in the *Exchange and Mart*, stating that he could supply them with the goods they desired and asking for a deposit or a post-dated cheque for the purchase-price. The prosecutors sent the money specified in the indictment, but did not receive the goods.

Hugo Marshall for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

Trevor Lloyd for the respondents.

The arguments sufficiently appear from the judgment.

DARLING J.: The Court thinks there is no ground for disturbing the conviction of the appellant for attempting to obtain £6 19*s.* by false pretences from Henry Mills. The evidence on that part of the case was quite plain and justified the verdict the jury returned.

1918
11 *November.*

JAMES MARSTON.

Darling J.

The case, however, is quite different with regard to the conviction for obtaining £1 by false pretences from Page Crone. That the appellant made a false pretence which resulted in the sending to him at the hotel from which he had written a registered letter containing the £1 there is no doubt. But when that letter arrived at the hotel it was not given to him because the police suspected him of carrying on an organised system of obtaining money by false pretences. The letter was handed by the manager of the hotel to a detective. At the police station the detective shewed the appellant the letter and said: "This letter has been received at the Grove Hotel for you." The appellant said: "You open them. I know what is in them. I intend to be straight about the whole thing. I know I have done wrong." In our judgment, to uphold a conviction of obtaining goods or money by false pretences it is not necessary that the accused should have had manual possession of the goods or money in question. It is sufficient if they are under his control. In *Wiley*, 2 Den. 37; 20 L. J. M. C. 4, 1850; *Smith*, D. & P. 494; 24 L. J. M. C. 135, 1855; and *Gleed*, 12 Cr. App. R. 32, 1916, that doctrine was recognised and we shall apply it here. If the letter in this case had been left or delivered at the hotel for the appellant. that would have been sufficient receipt of it by him. But as it was, the evidence was ambiguous. It was capable of the construction that the appellant really had control of the letter, and also that the manager or some other person in authority in the hotel took possession of it as the agent of the police. The Court is not entitled to assume that the appellant had control of the letter, and the conviction on this part of the case must be quashed. Under s. 5 of the Criminal Appeal Act, 1907, the Court substitutes for it a conviction of attempting to obtain the £1 by false pretences. The sentence of five years' penal servitude will be altered to two concurrent sentences of eighteen months' imprisonment with hard labour for the two attempts.

One conviction quashed; another substituted; sentence reduced.

Solicitor for the respondents—*The Town Clerk*, Wallasey.

G. B.

WALTER BIBBINGS.

1918
18 *November.*

Severity of sentence.

For purposes of sentence the interval since a previous conviction and the nature of the previous offence must be taken into account.

The appellant was convicted, on October 15th, 1918, before the Chairman, at the Glamorganshire Sessions, of larceny, and was sentenced to six months' imprisonment with hard labour.

The appellant did not appear, and was not represented by counsel.

Roland Oliver for the Crown.

AVORY J.: The appellant was convicted of stealing two basins and marble slabs from a barber's shop of which he had been the tenant. Previously it had been unoccupied for some little time. He set up the defence that he thought he had a right to take and sell the property, as they had belonged to the previous tenant to whom he intended to account for the proceeds of the sale. Unfortunately even for that story, when inquiry was made by the landlord regarding this property, the appellant said they were still lying about somewhere. At the police station he admitted that he knew he had no right to sell them. It is not surprising that the jury convicted him, and this Court sees no reason to interfere with the conviction.

In all the circumstances of the case, however, the sentence of six months' imprisonment with hard labour must be reconsidered. The premises had been unoccupied for some time, and it is quite possible that the appellant may have thought that nobody was likely to claim this property, and that may be some mitigation. Moreover, there do not appear to be any previous convictions against him, except one seventeen years ago of perjury in swearing an affidavit, for which he was sentenced to six months' imprisonment with hard labour. Although that is a very serious offence, it is not a conviction which ought to weigh against him when he is convicted of larceny seventeen years later. We think that the Chairman in sentencing him gave undue weight to the previous conviction. Having regard also to the fact that the

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18 *November.*

WALTER BISHINGS.

AVORY J.

appellant, although over sixty years of age, joined the army and served until discharged through ill-health, the Court thinks that the justice of the case will be met by a sentence of two months' imprisonment in the second division.

Sentence reduced.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE, AND MR. JUSTICE SHEARMAN.

CHARLES MARROWS.

1918
25 *November.*

Mitigation of sentence in view of meritorious conduct not known to the Court of trial.

Appeal against sentence.

The appellant was convicted on October 15th, 1918. before the Deputy-Chairman at the Warwickshire Sessions, of larceny, and was sentenced to three years' penal servitude.

The appellant did not appear and was not represented by counsel.

The Crown was not represented.

DARLING J.: The appellant was convicted of larceny as a bailee. He hired a bicycle and then stole it. He had been convicted twice before—in 1903 and in 1916, both times of dishonesty—and received very light sentences. Before he was sentenced on this occasion he asked the Chairman of the Sessions that a great many other larcenies which he confessed he had committed might be taken into consideration. His sentence on the material before the Court of Quarter Sessions was quite a proper one. This Court, however, has had further information regarding this case. It appears that the appellant only a short time before his conviction had been doing a good deal of work which was honest work, and which was of great value to the country in the active state of war in which it then was. He must understand that if he commits any crime of this sort again he will certainly be sent to penal servitude, but on this occasion the Court reduces his sentence to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

G. B.

1918
25 November.

ALFRED JAMES THOMPSON.

Severity of sentence.

Appeal against sentence.

The appellant was convicted on October 23rd, 1918, before the Recorder, at the Central Criminal Court, of unlawful wounding, and was sentenced to three years' penal servitude.

E. J. Purchase for the appellant: The appellant was indicted for wounding with intent to do grievous bodily harm, and the prosecution accepted a plea of guilty to unlawful wounding. The incident in question occurred in a Young Men's Christian Association Hut. The appellant, who lost one leg when he was aged fourteen, was wearing the uniform of a sergeant in the Army, to which he was not entitled. A quarrel arose between him and a boy. The prosecutor, Mr. Todd, interfered. The appellant lost his temper and attacked Mr. Todd. Eventually they were separated, but later the appellant threw a piece of wood at Mr. Todd, injuring his eye. There is no danger of the prosecutor's losing his eyesight. There were previous convictions against the appellant, but they were all summary. It seems that though he pleaded guilty to unlawful wounding, he was sentenced for wounding with intent. The Recorder apparently also allowed the suspicion that the appellant was masquerading as a soldier who had lost his leg in the war to influence him when giving sentence.

Lord Coleridge J.: The appellant's offence was no doubt aggravated by the fact that without any doubt he was masquerading as a wounded soldier who had lost a leg in the service of his country, and was trading on the charity and benevolence of his fellows. He was cruelly maltreating the boy to whose rescue the prosecutor went. This Court, however, has to consider what was the offence to which the appellant pleaded guilty. It was unlawful wounding, which excludes the idea of deliberate intention. In the circumstances we think that the justice of the case will be met by reducing the sentence to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

Solicitors for Appellant—*Edgar Smith & Co.*

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

JAMES SWENSON.
ANTON FRANK CABA.

1918
9 *December.*

Severity of sentence.

As a general rule robbery with violence should be punished by flogging.

Appeals against sentence.

The appellants were convicted, on 2nd November, 1918, by Mr. Justice Coleridge, at Chelmsford Assizes, of shopbreaking and robbery with violence, and were each sentenced to seven years' penal servitude.

The appellants appeared in person.

The Crown were not represented.

AVORY J.: The appellants, who are Canadian soldiers, were stationed at Purfleet. They broke into a shop and stole a quantity of goods. On the same night they robbed with violence the mate of a barge which was lying in the river off Grays. The robbery with violence was a very serious offence. The mate was going to his barge when he was struck on the back of the head by one of the appellants. He fell to the ground unconscious. When he recovered his senses he found one of the appellants kneeling on his chest and punching him in the face, while the other was kicking him on the head. The appellants then robbed him of as much of his money as they could lay hands on. There is nothing to show that the appellants have been convicted previously either in this country or in Canada. No doubt, the judge would not have imposed such long sentences of penal servitude if he had not

1918
9 *December.*

JAMES SWENSON. ANTON FRANK CABA.

AVORY J.

taken the view that he ought not to order the appellants to be flogged. This Court takes a different view of the punishment which ought to be awarded in such circumstances. Seven years' penal servitude is too long a sentence in the circumstances. In view of the character of the assault and as a warning to soldiers and others, the Court alters the sentence of seven years' penal servitude, and directs that each of the appellants shall receive twenty strokes of the cat-o'-nine-tails, and shall be imprisoned with hard labour for twelve calendar months.

Sentence reduced and varied.

G. B.

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13 *December.*

FREDERICK KEYS.

Fresh evidence: witness recalled by the Court.

Appeal against conviction.

The appellant was convicted, on October 21st, 1918, before Mr. Justice Coleridge, at the Norfolk Assizes, of attempted carnal knowledge of a girl under thirteen, and was sentenced to thirteen months' imprisonment with hard labour.

Powell, K.C., and *Leighton* for the appellant.

Poyser for the Crown.

Further evidence was called, the effect of which appears in the judgment.

DARLING J.: The Court is called on to review the finding of the jury in this case on a question of fact. The witnesses for the prosecution were very young children. Their notion of time was very untrustworthy, but some of them undoubtedly identified the appellant as the soldier who was in a position to abuse the little girl as she was abused. One was called before us this afternoon. She now says that the evidence she gave at the Assizes was untrue, and that she only identified the appellant because he used to take washing to her mother's house, and because she was told by the relatives of the little girl assaulted that she must

identify him as the man. Whether that is true or not we do not profess to say, but there was adduced on behalf of the appellant evidence of considerable force which tended to prove an *alibi*. In these circumstances, it appears to the Court that if the case had stood at the Assizes as it stands to-day, the judge's summing up would have been different, and for that reason we allow the appeal.

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13 *December.*
FREDERICK KEYS.
Darling J.

Conviction quashed.

Solicitors for Appellant—*Joseph, Steward & Pretty*, Norwich.

G. B.

ANNIE WHITE.

16 *December.*

In a proper case counsel for the defence ought to submit, at the close of the case for the Crown, that there is no evidence to go to the jury.

Appeal against conviction, on certificate.

The appellant was convicted, on November 11th, 1918, before Shearman J., at the Derbyshire Assizes, of manslaughter. Sentence was deferred pending the decision of this Court.

Marshall Freeman for the appellant, who was on bail. The appellant was convicted of the manslaughter of her illegitimate child. According to the medical evidence it was born alive, but it was found by the appellant's mother shortly after birth dead with a fractured skull. The prosecution suggested that the woman, knowing the child was about to be born, stood up so that the child should fall on the floor; that in fact it did so: and that in this way it received the fracture of the skull which caused its death. It is submitted that there was no evidence to support this theory, and none to show that the injuries to the child had been inflicted by the appellant.

Drysdale Woodcock for the Crown. Although there was no direct evidence of the appellant's guilt, there was evidence from which the jury could infer that she was responsible for the child's death. It was proved (a) that the child was illegitimate; (b) that no preparation was made for its birth; (c) that it was born alive;

1918
16 *December.*

ANNIE WHITE.

Darling J.
Avory J.
Salter J.

and (d) that it died from injuries received after birth in the presence, if of anyone, of the appellant alone.

DARLING J.: The difficulty which has faced the prosecution in this case is to show that the appellant had anything whatever to do with the injuries which caused the child's death. At the end of the case for the prosecution counsel for the defence ought to have submitted that there was no case to go to the jury and, if he had done so, it would have been the duty of the judge to give effect to the submission. There was no evidence that the child was wilfully knocked about, and none that, if a blow was given or the child was otherwise ill-treated, the appellant gave the blow or was guilty of the ill-treatment. The case is one of the very gravest suspicion, but the verdict cannot be upheld on the evidence, and the appeal must therefore be allowed.

Conviction quashed.

Solicitors for Appellant—*Guscotte, Wadham, Tickell & Co.*, for *Goodwin and Cockerton*, Bakewell.

G. B.

The Court (Darling, A. T. Lawrence and Shearman JJ.) also sat on Friday, December 20th.

WILLIAM JONES.

Severity of sentence.

Without laying down any general rule, the Court leans, on a first sentence to penal servitude, to a term of three years.

Appeal against conviction and sentence.

The appellant was convicted, on November 23rd, 1918, before the Deputy-Chairman, at Middlesex Sessions, of housebreaking, and was sentenced to five years' penal servitude.

The appellant in person.

E. A. Parkyn for the Crown was not called on.

1918
16 *December*.

WILLIAM JONES.

Salter J.

SALTER J.: The appellant was found in a house which had been broken into, and in our view his conviction was clearly right. He had been six times previously convicted of this kind of offence and sentenced to various terms of imprisonment, but never to penal servitude. It is undesirable to attempt to lay down general rules for fixing sentences. Each sentence must depend on the facts of the particular case. Having regard to the fact that the appellant had not been sentenced to a term of penal servitude before, and that this was not a grave case of housebreaking, the Court thinks that the sentence should be reduced to one of three years penal servitude.

Sentence reduced.

G. B.

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Photographed from the only available copy of the original edition and reprinted by Photo-Lithography in Great Britain at The Haycock Press Ltd., London.

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